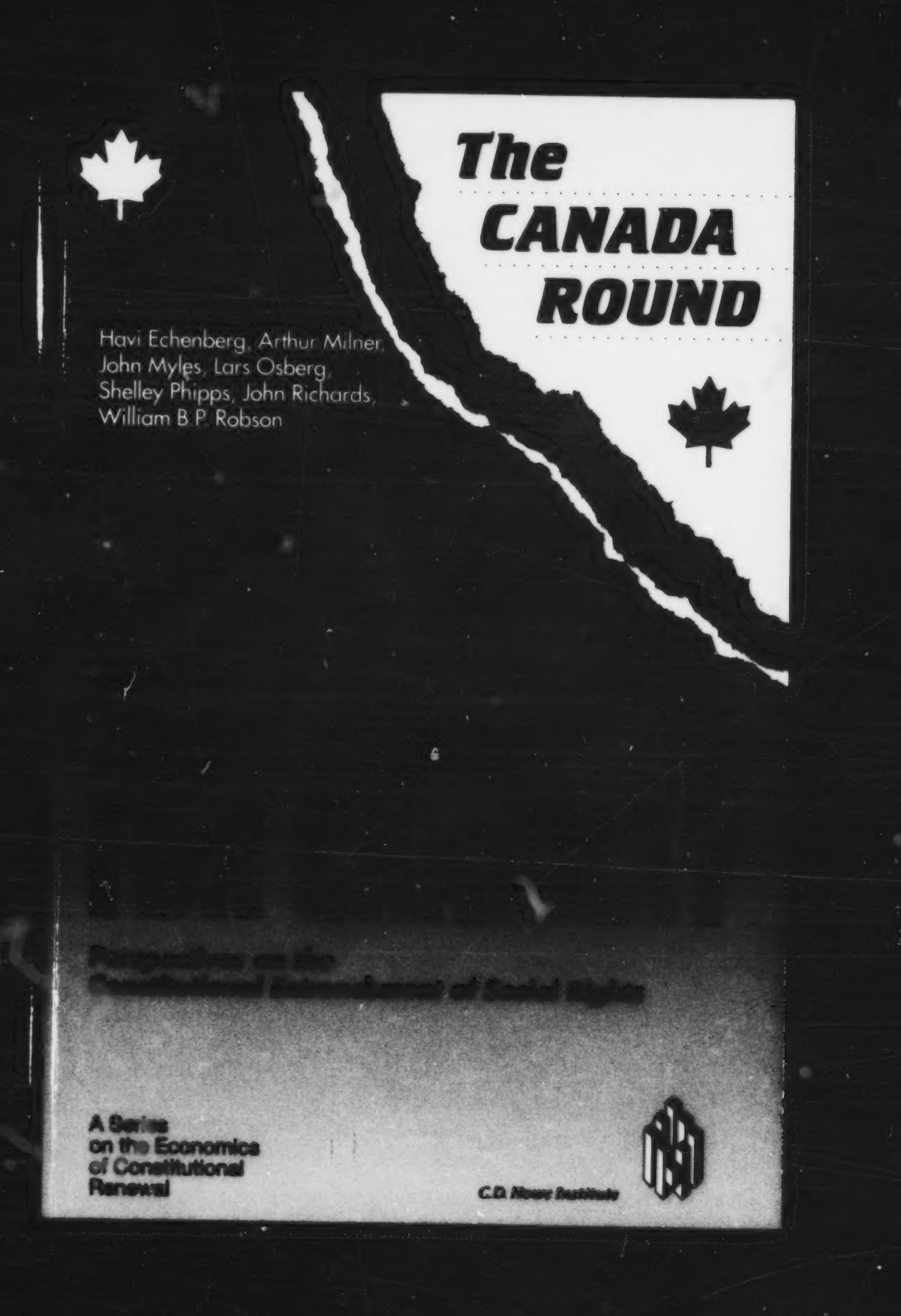
The
CANADA
ROUND
Havi Echenberg, Arthur Milner,
John Myles, Lars Osberg,
Shelley Phipps, John Richards,
William B.P. Robson
A Series
on the Economics
of Constitutional
Renewal
C.D. Howe Institute

C.D. Howe Institute

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A Social Charter for Canada?

Perspectives on the Constitutional Entrenchment of Social Rights

Havi Echenberg, Arthur Milner, John Myles, Lars Osberg, Shelley Phipps, John Richards, William B.P. Robson

The Canada Round:
A Series on the Economics of Constitutional Renewal — No. 9

John McCallum, Series Editor

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Foreword

Canada appears poised to embark on an historic political reconfiguration. It is essential that this process be undertaken with a clear and widely diffused understanding of the well-spring of Canadians' economic prosperity.

It is with that in mind that the C.D. Howe Institute presents this series of monographs entitled *The Canada Round*. The series assembles the work of many of Canada's leading economic and political analysts. The monographs are organized into two groups. The first group, called "The Economics of Constitutional Renewal", rests on the assumption of renewed federalism and is organized around economic themes. It examines the economic goals that Canadians have set for themselves, as well as the means of achieving them and the influence of alternative constitutional structures.

The second group of studies, called "The Economics of the Breakup of Confederation", examines the economic consequences of Quebec independence for both Quebec and the rest of Canada. A unique feature of the "Breakup" studies is that they are integrated with the research that has already been carried out by Quebec's Bélanger-Campeau Commission. Where appropriate, each of the studies in this group includes a summary of the relevant analysis by the Bélanger-Campeau Commission, contributions by experts from across Canada, as well as shorter critiques or replies. This format, we believe, will help to pierce Canada's "several solitudes" and create a pan-Canadian meeting of minds.

The Canada Round is not intended to alarm or frighten — the process of collective political definition in this country will turn on more than simply questions of dollars and cents. And, as these monographs will reveal, economics rarely produces an open-and-shut case as to the superiority of one possible set of rules over another. Even if it could do this, it would be unwise to assume that

economic analysis alone could change the minds of those who are already committed to a particular vision of the political future.

It is equally clear, however, that Canadians are now seeking a greater understanding of the links between the economy, the Constitution, and legal and political life. A significant reform of the Constitution will influence the economy, in some cases for the better; a rending of the Constitution under conditions of acrimony will almost certainly damage it. Thus, the purpose of the series is to help Canadians think constructively about the benefits and costs of alternative constitutional designs.

Underlying the series is a focus on the economic well-being of Canadians, now and in the future. To best insure this well-being over the short run, Canada needs calm, open negotiations in which efforts are made to understand and incorporate the aspirations of all the participants. This series of monographs is dedicated to that effort.

John McCallum, the series editor and Chairman of the Department of Economics at McGill University, organized the intellectual input. Within the C.D. Howe Institute, David Brown, Senior Policy Analyst, played a coordinating role. This ninth monograph in the series was copy edited by Lenore d'Anjou and Barry A. Norris, and desktop published by Brenda Palmer. As with all C.D. Howe Institute publications, the analysis and views presented here are the responsibility of the authors and do not necessarily reflect the opinions of the Institute's members or Board of Directors.

Thomas E. Kierans
President and
Chief Executive Officer

The Study in Brief

Lars Osberg and Shelley Phipps argue strongly that a social charter has become an essential part of constitutional reform in Canada. Furthermore, they maintain, there is an important link between the strength of the "economic charter" and that of a social charter. A strong economic charter would reduce the role of the democratic process in restraining the impact of market forces. This, the authors say, would then imply the need for a strong social charter, which would protect citizens who are adversely affected by those market forces. Because of the speed of social and institutional change, the social charter must provide a legal framework that entrenches enduring social values, including the principle that all Canadians have the right to food, clothing, shelter, health care, and education.

Osberg and Phipps consider the advantages and disadvantages of a variety of alternative means of achieving these objectives. Examples include the administrative route followed by the European Community's social charter, the appointment of a Canadian "Social Rights Commissioner", and the adoption of a charter that is fully justiciable. While they do not express a preference for any particular formula, Osberg and Phipps do argue that, whatever version of a social charter is chosen, it should provide individuals with a forum in which they can present evidence that policies are not working. Moreover, governments would have to change policies that were found to have failed.

The contributions by Havi Echenberg and Arthur Milner and by John Myles expand on some of the themes introduced by Osberg and Phipps, and reinforce the case for a social charter.

On the other hand, both John Richards and Bill Robson oppose a justiciable social charter. Richards suggests that Canadians may be at or near (or beyond?) their limit in terms of their willingness to pay taxes. If this is so, then a social charter can only succeed in forcing

governments to spend more on social policy by generating larger deficits. Moreover, Richards argues, a social charter might dilute the accountability of provincial governments in delivering services, make it harder for these governments to give "value for money," and retard beneficial intergovernmental competition. Ultimately, all of this could lead to a reduced willingness on the part of Canadians to agree to policies that redistribute income. Richards says that the Charter of Rights and Freedoms has extended justiciable rights about as far as is practicable. On the other hand, he does favor a nonjusticiable or administrative charter, and concludes his essay with "a modest proposal for a simple social charter."

While agreeing with many of Richards' points, Robson is less prepared to compromise. He is adamantly opposed to a justiciable charter, arguing that it is fundamentally undemocratic and that it attempts to "provide the welfare state of the past with constitutional armor," when what we should be doing is preserving "as much flexibility as possible for dealing with the social challenges of the future."

Osberg ends the volume with a reply to Richards and Robson.

If one point is clear, it is that the volume has produced no consensus on whether or not Canadians should opt for a social charter.

John McCallum
Series Editor

A Social Charter for Canada

Lars Osberg and Shelley Phipps

Canadians are asking for a lot when they ask for a redesigned Constitution. They want (and need) a Constitution poetic enough to reflect what it means to be Canadian, yet practical enough to solve real problems, a document to cope both with the demands of the present day and with the needs of the future, and a legal framework for the evolution of the social contract. Furthermore, constitutional design has real and important implications for the type of society Canada will become. Hence we argue that a revised Canadian Constitution should reflect enduring Canadian social values.

The constitutional reform process is no abstract exercise. It is proceeding in real time, articulated by real personalities, encumbered by real history, and has a real deadline. An important aspect of this reality is the fact that the present federal government, which is, of necessity, intimately involved in the process of constitutional reform, carries the baggage of the failed Meech Lake process. Furthermore, it is not trusted by a significant fraction of the population to protect distinctively Canadian social values. If a new round of constitutional reform is to be successful, these handicaps cannot be ignored; hence both the process and the results must recognize the need to safeguard basic values visibly and credibly.

We thank Michael Bradfield, David Braybrooke, Peter Burton, Philip Girard, Tom Kierans, Don Lenihan, Alasdair Sinclair, Mark Setterfield, Leon Trakman, and the other contributors to this volume for their very helpful comments, as well as Rebecca Redmond for her work as research assistant. Since we did not take all the advice we were offered, any errors remaining are our own responsibility.

Social policy is a key aspect of Canadians' self-image as a "kinder, gentler" society within North America. Social policy is central to the relationship between the modern state and its citizenry and it presents, in a federal state, some of the most difficult problems of jurisdictional responsibility.

Thus, this essay focuses on the need for a social charter. We emphasize, however, that proposals for such a document cannot be considered in isolation. If other parts of a revised Constitution contain what some call an economic charter of enhanced guarantees for the free flow of goods, services, capital, and labor, one implication is a decreased role for the democratic process in restraining the impact of market forces. Those who think that they are likely to be adversely affected thereby will want some credible guarantee that their interests will not be irreparably damaged by constitutional reform. Hence, the stronger the guarantees involved in an economic charter, the stronger the demands will be for a credible social charter. To some extent, therefore, the exact form that a social charter takes must depend on the form that other parts of the Constitution take. But it is essential for the political acceptability of the process as a whole that guarantees for the market process be matched by guarantees for social and economic rights.

Throughout this essay, we stress three major themes:

- The rapidity of social and institutional change in modern societies implies that a specific division of responsibilities for the achievement of social goals can rapidly become obsolete. Hence, a Constitution that aims at providing an enduring legal framework should directly express, at least in general terms, enduring social values. When the pace of change was slower, as it was in 1867, one could envisage a Constitution whose only function was to divide legislative powers between federal and provincial jurisdictions. In the twenty-first century, such a Constitution would be rapidly outpaced by events.
- The effective expression of individual legal and political rights requires a minimum level of social and economic standing. (It is not clear, for example, how the homeless can derive much

practical benefit from a general legal right to personal privacy or how they can effectively participate in political life.) Over time, the concept of individual rights has broadened as the concept of citizenship has expanded. We think it is time for Canada to recognize constitutionally that "the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."[1]

- Entrenching the rights of individuals to adequate levels of basic necessities means entrenching the social responsibility of the Canadian community to all its members. Conceptually, acceptance of a social responsibility differs from acceptance of individual rights. The word "responsibility" invokes connection and caring among the individuals living together in a community, while "rights" suggests self-interested individuals' fighting for what is owed to them. In practical terms, the main difference between the two concepts is that many disadvantaged Canadians may lack the information, self-confidence, or financial resources necessary to claim their rights. We do *not* argue that all members of the Canadian community have to be treated in exactly the same way — Canadians are simultaneously Canadians *and* Québécois, native people, or members of other provincial or ethnic communities. There are valid cultural, economic, or social reasons why different policies are appropriate in different contexts and in different subnational communities. Yet all Canadians have a right, as Canadians, to expect that the end result of these different policies will be access to basic necessities for everyone.

The plan of this essay is as follows. First, we lay out some of the major social and economic trends — trends in household composition, labor market institutions, poverty, and inequality — that have changed and will continue to change the shape of Canadian society and thus the demands made on social policy.

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1 United Nations, General Assembly, Resolution 32/130 (1977).

The second section outlines some of the reasons why a social charter is now an essential part of the constitutional reform process. They include the policy demands that social and economic trends imply for government as well as the likelihood that constitutional reform will produce some devolution to the provinces of administrative responsibility for social policy.

The third section discusses alternative forms that a social charter might take. Each has significant advantages and disadvantages; we suggest that the critical issue is that a credible and effective charter be adopted. (We hope that this essay helps to start a debate on the nuts and bolts of how this can best be accomplished.) The final section suggests that a Canadian social charter should guarantee the right to adequate food, clothing, shelter, health care, and education.

Recent Canadian Social and Demographic Trends

Table 1 presents selected demographic and labor market trends to highlight the changing characteristics of Canadian society that underlie the ever-changing demands on the country's social institutions. The first part of the table indicates the changing pattern of family types in Canada. In 1961, 65 percent of Canadian families were of the traditional variety — husband-and-wife couples with only the husband earning income. By 1986, this household type represented only 12 percent of all families; couples with both spouses employed in the paid labor market had come to represent the most common type of Canadian family. Single-parent families had also become significantly more common, an increase that can be attributed to a rise in the number of children born to never-married mothers as well as to a sixfold rise in the divorce rate.

It is clear that social policy designed with the image of the male breadwinner/female homemaker in mind is no longer appropriate for Canadian society. Moreover, if the pace of change in family structure continues at the same rate as has characterized the recent past — and there is every reason to expect that this will be the case

Table 1: *Demographic and Labor Market Trends in Canada, 1951–86*

	1951	1961	1971	1981	1986
Distribution of family types (% of total)					
One earner, husband only	–	65	32	16	12
Two earners, both spouses	–	14	36	49	52
Single-parent families	–	6	9	11	13
Other families	–	16	23	24	23
Divorce Rate (no. per 100,000 population)	37.6	36.0	137.6	278.0	244.4
Labor market					
Unemployment rate (%, unadjusted)	2.4	7.2	6.3	7.5	9.5
Part-time jobs (% of labor force)	4.0	7.8	12	13.5	15.5
Labor force participation rate (%)					
All women	24.1	29.5	39.4	51.7	55.1
Married women	11.2	22.0	37.0	50.5	56.1
Female/male earnings ratio					
All earners	–	–	0.469	0.535	0.574
Full-time, full-year earners	–	–	0.597	0.637	0.658

Sources: Statistics Canada, *The Labour Force*, Cat. no. 71-001, various issues; M. Eichler, *Families in Canada Today* (Toronto: Gage, 1988); M. Gunderson, L. Muszynski, and J. Keck, *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, 1990); and M. Baker, *The Family: Changing Trends in Canada* (Toronto: McGraw-Hill Ryerson, 1987).

— the policies and institutions designed to accommodate the pattern of family types observed in Canada today will have to change at least as substantially in the next 30 years as they have in the past 30.

The second part of Table 1 reflects changes in the labor market. Corresponding to the dramatic increase in the percentage of husband-and-wife families with two labor market participants, labor force participation rates almost doubled for all women from 1951 to 1986 and shot up more than fivefold for married women during the same period. For many households, the addition of a second labor market income helped to offset the negative consequences of high unemployment and stagnating real wages. As Dooley argues, much of the difference in poverty rates between married-couple families and single-parent families results from the increasing labor force

Table 2: *The Incidence of Poverty in Canada, 1971, 181, and 1986*[a]

	1971	1981	1986
		(percent)	
National			
Family	15.9	12.0	12.3
Individual	37.6	37.4	34.3
Atlantic, family	26.4	16.6	15.8
Quebec, family	17.7	14.8	15.3
Ontario, family	11.2	9.9	8.7
Prairies, family	20.9	11.3	12.9
British Columbia, family	12.0	9.4	13.3
Head over 70			
Family	39.1	13.6	9.9
Individual	65.3	61.6	44.9
Single parent (female head)	–	44.3	43.7
Couple plus unmarried children	11.8	8.9	9.6
Poverty odds[b]	6.8	6.4	5.3
Working poor families[c]	46.6	44.7	42.0

[a] Statistics Canada low-income cutoff: for 1971, using 1967 base; for 1981 and 1986, using 1978 base.

[b] Ratio of poverty rate for nonelderly families with head working zero weeks to poverty rate for nonelderly families with head working 50 to 52 weeks.

[c] Percentage of all poor families with head working 20 or more weeks in a year.

Source: Statistics Canada, *Income Distributions by Size*, Cat. no. 13-207, various issues.

participation of married women.[2] Yet, increased labor force participation also means that many women face a double day of work, inside and outside the home.

Today, a majority of households rely on the earnings of women as well as the earnings of men. Unfortunately, earnings for the two groups continue to be highly inequitable. Overall, Canadian women received less than three-fifths of what Canadian men received in

2 M.D. Dooley, "Changes in the Market Work of Married Women and Lone Mothers with Children: 1973–1986" (Department of Economics, McMaster University, 1990, Mimeographed).

1986. Even women employed full time, full year earned less than two-thirds of what men earned.[3]

Table 2 reports some basic data on trends in the incidence of poverty in Canada. The 1971–86 period saw some small reductions in national poverty rates, but progress largely stopped in 1981. For many groups, in fact, poverty rates increased between 1981 and 1986. The recession of 1981–82, the continuation of high unemployment, and a series of public policy measures restraining transfer payments meant that progress in the reduction of poverty ceased or even reversed.

In 1986, more than one in ten Canadian families and one in three unattached individuals received incomes less than the Statistics Canada low-income cutoff. Smeeding, Torrey, and Rein report that 15.5 percent of all children in Canada are poor.[4] Current institutions and policies have failed to meet the basic income needs of a significant number of the country's youngest citizens.

Is this because it would cost "too much" to eliminate poverty? Phipps calculates that, in 1986, Canada's "poverty gap" — the amount required to bring the income of all Canadians up to the poverty line — was about 1.04 percent of gross domestic product (GDP).[5] To put the figure in perspective, one can note that 1986 consumer expenditure on alcohol amounted to 1.07 percent of GDP.[6]

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3 Notice that the rate of change in female/male earnings ratios in Table 1 is markedly less than the other changes noted there.

4 T. Smeeding, B.B. Torrey, and M. Rein, "Patterns of Income and Poverty: The Economic Status of Children and the Elderly in Eight Countries," in J.L. Palmer, T. Smeeding, and B.B. Torrey, eds., *The Vulnerable* (Washington, D.C.: Urban Institute Press, 1988).

5 S. Phipps, "Measuring Poverty among Canadian Households: Sensitivity to Choice of Measure and Scale," *Journal of Human Resources* (forthcoming).

6 Ibid. Some would argue that any program to eliminate poverty through income transfers would lead to massive reductions in work effort as the currently employed attempted to take advantage of the program. We argue, based on accumulating econometric evidence, that this is unlikely to be a significant problem. Most recent Canadian and U.S. studies find the wage and income elasticities of labor supply to be very close to zero. Most people with jobs work the number of hours required of them. Few would quit to live on a poverty-level income. For recent surveys of Canadian estimates of labor elasticity, see S. Phipps..

If one considers the incidence of poverty by region, it is clear that between 1971 and 1986 the improvement in poverty rates among families in Atlantic Canada and the Prairie provinces was substantially greater than the national trends. Yet, the incidence of poverty for families in Atlantic Canada was 1.75 times that of families living in Ontario in 1986, and the differential is little improved today.

The outstanding success story in poverty policy has been the dramatic reduction in the rate of poverty among older Canadians. Increased transfer payments through the Guaranteed Income Supplement plus the advent of the Canada Pension Plan and Quebec Pension Plan (CPP/QPP), reduced the incidence of poverty among older families from two in five in 1971 (well over twice the national rate) to one in ten in 1986 (well below the national rate).

On the other hand, two of the most dismal failures of poverty policy have been the continued high incidence of poverty among female-headed, single-parent families and among native Canadians. With a poverty incidence of 45 percent in 1986, single-parent households were 3.5 times more likely to be poor than the average Canadian family. This fact, in combination with the growing number of female-headed, single-parent households has led to concern about the growing feminization of poverty in Canada.[7] Native Canadians also continue to experience poverty far more frequently than non-aboriginal Canadians.[8]

Note 6 - cont'd.

..."The Impact of the Unemployment Insurance Reform of 1990 on Single Earners," *Canadian Public Policy* 16 (1990): 252–61; and D. Hum and W. Simpson, *Income Maintenance, Work Effort and the Canadian Mincome Experiment* (Ottawa: Economic Council of Canada, 1991).

7 See Dooley, "Changes in the Market Work"; M. Gunderson, L. Muszynski, and J. Keck, *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, 1990); and D.P. Ross and E. R. Shillington, *The Canadian Fact Book on Poverty — 1989* (Ottawa: Canadian Council on Social Development, 1989).

8 It is important to note that the usual surveys used to construct measures of poverty in Canada leave out native Canadians living on reserves and Canadians living in institutions. Thus, we have very limited information concerning the specific poverty experiences of groups that other evidence indicates continue to be among the poorest in the country. We could not find, for example, incidence figures directly comparable to those reported in Table 2.

Table 3: ***Income Inequality: Quintile Shares of Total Money Income before Tax for Families and Unattached Individuals, 1951–86***

	1951	1961	1971	1976	1981	1986
Quintile 1 (poorest)	4.4	4.2	3.6	4.3	4.6	4.7
Quintile 2	11.2	11.9	10.6	10.7	10.9	10.4
Quintile 3	18.3	18.3	17.6	17.4	17.6	17.0
Quintile 4	23.3	24.5	24.9	24.7	25.2	24.9
Quintile 5 (richest)	42.8	41.1	43.3	42.9	41.8	43.0

Sources: L. Osberg, *Economic Inequality in Canada* (Toronto: Butterworths, 1981), p. 11; and Statistics Canada, *Income Distribution by Size in Canada, 1987*, Cat. no. 13-207, p. 143.

One can think of paid employment as a necessary but not sufficient condition for the non-elderly to avoid poverty. The line labeled "poverty odds" in Table 2 reports the ratio of the incidence of poverty among non-elderly families whose head did not work in the previous year to the incidence of poverty among similar families whose head worked 50 to 52 weeks. Those families without an employed head were about six times more likely to be poor than those families whose head was employed full year. It is apparent, however, that the differential is diminishing over time, no doubt reflecting the emerging polarization of the wage structure.[9] And although participation in the paid labor market dramatically reduces a family's chances of being poor, it remains true that more than 40 percent of all poor families have significant labor force attachment.

Table 3 presents an overview of the distribution of money income among Canadians from 1951 to 1986. Hiding behind these aggregate numbers are the complex processes by which labor market earnings, transfer payments, and capital income are determined and by which individuals are combined into households whose sizes

9 The Economic Council of Canada reports that 27 percent of the labor force in 1967 had earnings that could be categorized as "middle-income". By 1986, only 22 percent of the labor force could be classified in this way. See Economic Council of Canada, *Good Jobs, Bad Jobs: Employment in the Service Economy* (Ottawa: Supply and Services Canada, 1990), p. 15.

vary over time — not to mention the thorny theoretical issues involved in constructing a measure of aggregate inequality.[10] Nevertheless, the basic lessons of Table 3 are fairly robust. As others have noted,[11] given the fairly dramatic changes that occurred in Canadian society between 1951 and 1986, it is remarkable how little change there was in the aggregate distribution of money income. One can discern a slight improvement in the income share of the poorest quintile, a change largely reflecting the improvement in the relative economic position of retirees mentioned earlier. Households in the second and third quintiles slipped in their relative shares of aggregate income, but there is no discernible trend to a lesser share for the richest fifth of the population.

In part, the relative constancy of the Canadian income distribution reflects the role of transfer payments in mitigating adverse shocks to market earnings — shocks such as unemployment, which, as Table 1 indicates, increased dramatically over the 1951–86 period. In part, too, the constancy of the income distribution reflects the counteracting influences of a variety of social trends, such as increased female labor force participation rates, the rise in divorce rates, and the decline in family size. In addition, successive waves of boom and bust and inflation and deflation had partially offsetting effects on the real and nominal values of labor and capital income streams.

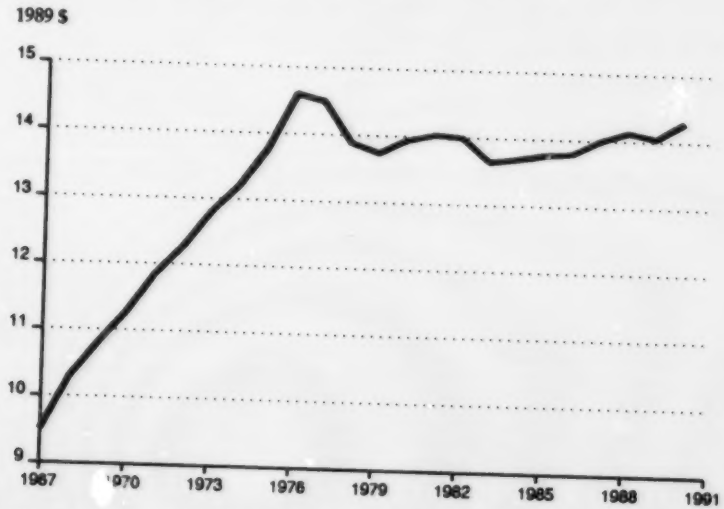
The poorest fifth of Canadian households has always depended heavily on transfer payments. The second quintile is increasingly dependent on transfers as well. In 1973, it received 19.8 percent of its income from transfer payments; by 1989, the figure had increased to 30.4 percent.[12] This increased dependence of lower-middle-income

10 These issues are discussed in more detail in L. Osberg, *Economic Inequality in Canada* (Toronto: Butterworths, 1981); and S. Jenkins, "The Measurement of Income Inequality," in L. Osberg, ed., *Economic Inequality and Poverty: International Perspectives* (Armonk, N.Y.: M.E. Sharpe, 1991).

11 For example, M. Wolfson, "Stasis amid Change — Income Inequality in Canada 1965–1983," *The Review of Income and Wealth* 32 (1986): 337–370.

12 Economic Council of Canada, *Employment in the Service Economy* (Ottawa: Supply and Services Canada, 1991), p. 149; and Statistics Canada, *Income Distribution by Size in Canada 1989*, Cat. no. 13-207.

Figure 1: ***Real Hourly Wages in Canada, 1967–90***



Sources: Calculations by the Economic Council of Canada based on data from Statistics Canada's Labour Force Survey and its Labour Division.

families on transfer payments largely reflects the decreased capability of labor market participation to shield families from poverty, which reflects in turn the stagnation in real hourly wages and increased unemployment of the past two decades.[13]

Figure 1 graphs real average hourly wages and salaries in Canada between 1967 and 1990. The late 1960s and early 1970s saw substantial increases, but the last 15 years were characterized by stagnation. Moreover, stagnation in *average* hourly earnings does not reveal the increased polarization of the wage structure or the steady decline in the proportion of all workers earning between 75 and 125 percent of the median wage.

Data on average hourly earnings also fail to indicate the growth in nonstandard employment. The Economic Council of Canada

13 For a survey of these trends, see Economic Council of Canada, *Employment in the Service Economy*, especially ch. 8.

reports, for example, that since 1975, at least 30 percent of new jobs created in most provinces were part-time jobs.[14] As well, there has been significant growth in short-term work — jobs of less than six months' duration — and in the self-employment of individuals who do not in turn have employees. Finally, temporary-help agency work tripled in the 1980s alone. Together, these forms of nonstandard employment constituted about half of all new jobs created between 1981 and 1986, and they now constitute nearly 30 percent of total employment!

These changes in the Canadian labor market mean that an increasing number of workers are not the full-time/full-year employees for whom the social insurance programs of the Canadian welfare state, such as CPP/QPP and unemployment insurance (UI), were designed. These changes in the institutional structure of the labor market can have significant effects on governmental responsibilities and the federal-provincial split. If there is no work available, for example, workers who are self-employed or have insufficient hours or weeks of work are not eligible for UI (a federal program) and must apply for provincial social assistance benefits. Workers whose entire work history is characterized by nonstandard employment are generally not eligible for private pension benefits at the end of their working lives and so must turn to public benefits, federal and provincial. Such problems are particularly acute for women, who constitute a large fraction of nonstandard employment.

Socio-Economic Change and Constitutional Design

What does all this have to do with constitutional reform? The data illustrate the extent to which governments have (or have not) delivered on the social contract underlying Canadian society. Social and

14 The exceptions were Alberta, Prince Edward Island, and Ontario. See Economic Council of Canada, *Good Jobs, Bad Jobs*, pp. 11–12.

economic change can produce a mismatch between inherited social policies and institutions and the current needs of citizens. A static view of policies and institutions can fail to meet the basic economic and social needs of citizens living in a dynamic world. Hence, social policy must evolve if the social contract is to continue to be fulfilled. And since social policy is central to the Canadian self-image as a "kinder, gentler" society within North America, the Constitution must include a mechanism to ensure that basic Canadian social values are safeguarded, throughout these changes.

We emphasize that the existing Canadian "welfare state" has not been an abject failure. Indeed, it has had some outstanding success. Myles notes, "In all post-war capitalist democracies, economic responsibility for the maintenance of the elderly has been assumed by the state."[15] And as Table 2 indicates, Canadian governments have made substantial progress in meeting the needs of the older population, both through the expansion of targeted transfer programs and through the provision of services, such as medical care, that are disproportionately consumed by the elderly.

The social changes of the past 40 years, however, have also created challenges that have been less successfully met. One of the historic promises of capitalism has been economic progress. In a pure capitalist system, workers may not receive any direct share in profits, but the appeal of socialism is blunted if capitalism can deliver on the promise that real wages will rise over time. In the 1950s and 1960s, the standard of living of the Canadian working class did indeed rise as real average hourly wages increased. For the past 15 years, however, real average hourly wages have been essentially stagnant. Meanwhile, social and economic policy have become increasingly out of step with the realities many Canadians face every day.

The easiest way to see what has happened is to consider how and why the Canadian welfare state has developed. Although pure capitalism has never really existed in Canada and the state has

15 J. Myles, *Old Age and the Welfare State: The Political Economy of Public Pensions* (Lawrence, Kan.: University Press of Kansas, 1989), p. 1.

always been involved in economic affairs, the ideology of the 1920s stressed *laissez-faire*. The experience of the Great Depression of the 1930s and the evident success of wartime economic planning discredited the idea of a minimal state and set the stage for a postwar expansion of the welfare state. This expansion was founded on a particular underlying vision of the new social contract. The centerpiece was the maintenance, via Keynesian aggregate demand management, of full employment in a capitalist market economy. It was expected that technical progress and capital deepening would produce rising real wages while social insurance programs would provide both security of income for individual workers and automatic stabilizers for the macroeconomy during business cycle fluctuations. UI and other social insurance programs, such as workers' compensation, were not particularly intended to be anti-poverty programs. Rather, their focus was the maintenance of individual consumption during unavoidable periods of low earnings; hence they were to be run on insurance principles.

Family allowances were to assist in meeting the financial burden of large families and thus support consumption. But social assistance payments were to be limited to those households that could not supply labor to the paid labor market, such as those of widows, orphans, and the disabled. The expectation was that the typical household would contain a single (male) earner, working full time, full year from age 18 to age 65. With a minimum wage underpinning the wage distribution, upward pressure on average wages from the union movement, and selective use of tariffs to protect declining industries, prime-aged (male) workers would, it was thought, keep their families out of poverty by full-time, full-year work. And all this was conceived of as occurring within a Canadian economic space, in which intergovernmental transfers to the Atlantic and Prairie provinces were, in large part, compensation for protected markets enjoyed by Ontario and Quebec manufacturers.

From a constitutional perspective, this model had the convenient feature of clear jurisdictional responsibility. Social insurance and social assistance programs were seen as serving different client

populations and were delivered by different levels of government. By constitutional amendment, UI became a federal responsibility, while the provinces retained jurisdiction over social assistance. The federal government assumed a role in child welfare policy through the family allowance system, but in an era of housewife mothers the crucial need was seen to be financial, and the solution carried no implication for education, which remained a purely provincial responsibility. Although the system was modified over time — for example, the federal government shared in the costs of social assistance under the Canada Assistance Plan after 1966 — federal and provincial roles remained relatively unentangled.

One needs only to list the features of this vision of the Canadian economy to recognize both its continuing appeal for some sectors of society and its dissonance with current social and economic reality. The 1980s and early 1990s have been characterized by levels of unemployment higher than the country has experienced since the Great Depression, yet the focus of macroeconomic policy is firmly fixed on the prevention of inflation rather than the reduction of unemployment. The UI program has moved well away from insurance principles and has become, particularly in some rural regions, a pillar of the income-maintenance system. The whole idea of a "family wage" earned by a single (male) worker in each household is now both socially discredited and increasingly atypical — today's norm is the dual-earner household. With this shift has come a very slight increase in the average cash income of Canadian families — because two workers supply more paid working hours than one. But the greater cash incomes of dual-earner households are partially at the expense of unpaid household production and family life, a change that is particularly burdensome to women, many of whom work a double day as they continue to take primary responsibility for home and child care in addition to their paid employment. Governments are pressed to provide transfer payments to households that are unable to provide two workers to paid employment. And since the majority of families have little time left for work in the home, society is under pressure to compensate for the decline in

services previously provided there.[16] Polarization of the wage distribution and an increased rate of plant closures and layoffs have also produced increasing insecurity for many workers, even those with many years of service. And the globalization of trading patterns has increased the pressure on Canadian society for policy harmonization with other nations and decreased the country's ability to shelter declining industries and regions from international competition.

All these changes mean that the old mechanisms by which Canadian governments attempted to deliver on the social contract are increasingly inappropriate. Basic needs and social values change slowly, however. In 1991, as in 1951, there is a basic expectation that families should, if at all possible, support themselves economically through productive work.[17] Equal opportunity for all Canadians remains a basic social value. It is widely held that the full-time, full-year employment of the adult members of the household should provide a "decent" standard of living. It is also expected that people

16 For example, in a society in which the typical family has two parents, only one of whom is in the paid labor market, the other parent is available for child care, so the responsibilities of government in that area can be limited to financial assistance (such as family allowance) and the provision of formal education. Although current social and economic trends have rendered this model of the division of responsibilities obsolete, the needs of children have not changed. They continue to need both care and instruction, services that some families — particularly poor, two-earner couples and single parents — find increasingly difficult to provide. Social institutions have to change to cope with the new realities of day care needs. How these changes will take place raises important issues of equity — both between the generations and between members of the same generation — and efficiency.

A complicating factor is that the dividing line between day care and education is totally arbitrary. A constitution that attempts to impose such a distinction and assigns the former responsibility to federal child welfare policies and the latter to provincial ministries of education will become increasingly inappropriate for social needs. Hence, we argue that, in a world of rapid change, underlying social objectives should be constitutionally specified.

17 Ideas about who should support themselves through paid employment have, however, changed substantially over time. In an earlier era, women with young children were not expected to participate in the paid labor market. Married mothers were expected to rely on their husbands' earnings, single mothers on state (or family) support. Current attitudes have changed in favor of labor market participation by both married and single mothers.

should be able to turn to the community at large for assistance in the event of unemployment, sickness, disability, or other loss of livelihood in circumstances beyond their control. But although these expectations continue and produce increasing pressures on governments to provide transfers and services, the economic context is characterized by increasing fluidity of employment situations and heterogeneity of household types.

Why a Social Charter?

How can Canadians continue to uphold their basic social values in a changing world? What constitutional mechanism would offer some guarantee that the process of constitutional reform would not, perhaps inadvertently, jettison values they wish to maintain? We argue that guaranteeing the social and economic rights of Canadians through the adoption of a social charter is necessary to ensure the fulfillment of the social contract in a rapidly changing society. It is precisely because change is so rapid, in both social institutions and the economic environment, that the Constitution needs a clear statement of the objectives of social policy. The division of jurisdictional responsibility that is appropriate for today's environment may be highly inappropriate in the future. A mechanism is needed to ensure that governments can, and do, continue to deliver social policy that reflects Canadians' underlying values.

Diversity and Citizenship

One major advantage of a charter of social rights is that, in a rapidly changing world, it would provide a mechanism of redress for groups whose peculiar combination of circumstances does not fit within the existing set of administrative regulations of the jurisdiction in which they happen to reside. Some constituencies of the social welfare system have political visibility and political clout and can enforce their claims through political influence on the legislative process.

Others are too small, too socially stigmatized, or too unorganized to influence the political and bureaucratic processes effectively.[18]

When the old categories of the welfare state no longer fit the reality of social and economic trends and when those trends are changing with increasing rapidity, there is an increasing danger that individuals will slip through the cracks of the social welfare system. If, at the same time, there is substantial devolution to the provinces of administrative responsibility for social policy and labor market development programs, people will slip through at different rates in different places because each province will have its own particular system evolving at its own pace, making its own errors and recording its own particular successes. The inequities such a system would produce would be undesirable in themselves. They would also carry political implications. If actual outcomes differ substantially across provinces, at what point does the idea of a common citizenship begin to erode irreparably?

Canadians want to maintain both the idea of their common citizenship and the special characters of their communities within Canada. The entrenchment of social and economic rights would be an important element of a common core definition of Canadian citizenship, but different communities within Canada could, and should, find different routes to meeting these common objectives. For example, for cultural or social reasons, aboriginal communities may want to use a mechanism different from that considered appropriate elsewhere to ensure that all their members have adequate food, clothing, and shelter. The government of Quebec has long insisted that the cultural survival of its distinct population requires a distinctly different approach to education. None of this would be

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18 For example, a decreasing proportion of the elderly live within the extended family. The Canadian state has responded to this change in needs by assuming greater responsibility for their care — but the elderly constitute a large voting bloc. What social mechanism is in place to protect the interests of children in a world increasingly characterized by single parents who have little parental time available? Many economically disadvantaged groups do not have sufficient political power to lobby for necessary institutional or policy changes and need the protection of a social charter.

threatened by an overarching requirement that *all* Canadians have the right to adequate food, clothing, shelter, education, and medical care.

The fact that different mechanisms can satisfy the same fundamental rights would ensure that the diversity that is so much a part of Canada would be unthreatened. Simultaneously, the requirement that these rights must be respected for all Canadians would serve as a unifying value from sea to sea — an important plus in a country that wants to preserve both unity and diversity.

Guarantees for Markets and for People

A social charter is also required because private market transactions are increasingly unable to meet the economic needs of many Canadians. As the Economic Council of Canada concludes, "The labour market is offering economic security to fewer Canadians."[19] Such a trend can only be exacerbated by constitutional reform that prohibits government interference with the operations of the market. Thus we argue very strongly that the Constitution should provide protection of the free market only on condition that effective guarantees for social and economic rights are received in return.

Those who say that we are mistaken in our economic analysis and that greater constitutional protection for market forces would have great benefits for the poor should, we suggest, have the courage of their convictions. If greater reliance on market forces would in fact generate greater market incomes for the currently disadvantaged, the guarantees of a social charter would simply be superfluous. Its protections would be something like the payment-for-damages clause in a standard apartment lease. If the tenant causes no damage, the clause has no effect, but meanwhile it has provided the landlord with the peace of mind required to rent the apartment. If freer markets really would produce socially acceptable outcomes, the

19 Economic Council of Canada, *Good Jobs, Bad Jobs*, p. 17.

policies to produce such markets would generate a set of market incomes sufficient for all Canadians to purchase adequate food, clothing, shelter, and so on; in that case, the importance of the social charter would lie in the fact that its assurances enabled the transition to freer markets to occur. Since agreement is required either to rent apartments or to embed freer markets and since neither landlords nor workers are generally willing to proceed on faith alone, some set of guarantees is needed.

The Broadening Concept of Citizenship

A constitution sets out the framework of the legal relationship between citizens and the state; implicitly, it defines the idea of citizenship. Over time, that idea has evolved and broadened. Thus, a third major reason for the adoption of an explicit charter of social rights is that it would both express and help to realize an idea of citizenship that is in keeping with the views of Canadians today.

During the nineteenth century, in Canada as in other parts of the British empire, the definition of citizenship was gradually extended to include all men as property qualifications for the exercise of the franchise were whittled away and eventually abolished. In this century, women secured the right to vote and to participate fully in political life, and in the past 30 years Indians on reservations gained similar rights.[20]

The concept of citizenship has expanded in scope as well as in eligibility. At the time of Confederation, there was no expectation that individuals had any particular right to medical care or social assistance. Indeed, universal, publicly financed medicare only was introduced in the late 1960s. Yet by now it has become so deeply entrenched in the expectations and self-definition of Canadians that it would be considered unconscionable for anyone in the country to

20 Although obtaining these rights of political participation is certainly an advance, it is clear that they have not brought with them the power necessary to improve the social and economic circumstances of many women and aboriginal peoples.

be denied needed medical care because of inability to pay. Nevertheless, such basic expectations are unprotected by any constitutional guarantees.

Social Rights in International Law

Fourth, Canada's international rhetoric has long recognized the validity of a social charter. Canada endorsed the Universal Declaration of Human Rights; its article 25 declares,

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[21]

Thus, the idea of guaranteeing social and economic rights is far from new.[22]

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21 United Nations, Universal Declaration of Human Rights (December 10, 1948). Canada also voted in favor of the 1977 United Nations General Assembly Resolution 32/130, which states:

(a) All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights;

(b) The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development; and

(c) All human rights and fundamental freedoms of the human person and of peoples are inalienable.

The United States and the United Kingdom refused to support Resolution 32/130.

22 See H. Echenberg and B. Porter, "Poverty Stops Equality, Equality Stops Poverty: The Case for Social and Economic Rights," in R.I. Cholewinski, ed., *Human Rights in Canada: Into the 1990s and Beyond* (Ottawa: Human Rights Research and Education Centre, 1990).

The Council of Europe adopted a social charter in 1961. It may not be entirely coincidental that many European countries have been more successful than Canada in meeting the economic needs of their citizens.[23] Although Canada does appear to be a kinder, gentler nation than the United States (where 22.4 percent of children were poor at the beginning of the 1980s), it does not compare well with most European countries.

Personal and Social Responsibility

Fifth, adoption of a social charter might constitute a step in the direction of making a reality of the Canadian self-image of a caring nation. Of course, Canadians also think of themselves as a self-reliant and adaptable lot. Individuals have a responsibility to contribute productively to society, to the extent that they can, in a rapidly changing world. In aggregate, it is the acceptance of this responsibility that will determine the flexibility and productivity of the Canadian economy and its ability to deliver an acceptable standard of living. For individuals, acceptance of this responsibility is an important element in maintaining self-respect and the respect of the wider community.

Yet, as we have already noted, a large proportion of the poor already work hard for their poverty. Some who are disabled simply cannot work. Many of the unemployed cannot find jobs of any type. Although we ourselves strongly believe in the work ethic, we also recognize that it is unfair to demand the impossible. Moreover, we believe there is a consensus that social responsibilities are not conditional on good behavior. We doubt that many Canadians would argue that an individual who has not "worked hard" or "behaved nicely" all year should starve in the streets or die of an untreated illness.

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23 For example, during the 1979–82 period, 4.9 percent of children in West Germany were poor, 5.0 percent in Sweden, 7.8 percent in Switzerland, but 15.5 percent in Canada. Smeeding, Torrey, and Rein, Table 5.6. See also T. Smeeding, M. O'Higgins, and L. Rainwater, *Poverty, Inequality and Income Distribution in Comparative Perspective: The Luxembourg Income Study* (Washington, D.C.: Urban Institute Press, 1990).

In our view, Canadians all have a social responsibility to ensure that every member of the community has the necessities of life.[24] This emphasis on social responsibility and its expression as constitutional guarantees for the social and economic rights of all citizens may involve a slightly different way of thinking than has been employed by constitutional designers in the past, one that emphasizes caring and responsibility rather than fair rules of the game for individual players. This way of thinking may seem slightly unfamiliar to some men — and men have always been the principal designers of constitutions — but it is consistent with "feminine" attitudes toward morality.[25] At present, it may not be feasible to entrench commitments of social responsibility in the legal language of a revised Constitution. Yet it would be consistent with past thinking to extend individual rights to include social and economic rights. Some may argue that such rights are vaguer than the more traditional political and civil rights, but surely this perception arises only because the idea of social and economic rights is newer. Certainly, if Canadians wish to design a Constitution that defines them as a caring people, it must guarantee all citizens access to the minimum standard of living that allows full participation in society — and thus the effective claiming of civil and political rights.

A Pragmatic Note

Finally, one can argue pragmatically for the adoption of a social charter in Canada at this time because without such a charter no constitutional deal may be possible. Many Canadians do not trust the current federal government to maintain national institutions and standards in social policy; they feel that their interests and their sense of what Canada is about may be at risk in the constitutional reform process. Unless it is crystal clear that these *are* being protected, the

24 The idea of community rights and responsibilities — most notably in the area of linguistic rights — has long been part of the Canadian constitutional tradition.

25 See C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).

magnitude of the alienation makes it likely that the process will fail. The extent of Canadians' disillusionment with politicians in general and the federal government in particular is such that they will be unlikely to accept general political statements about the "sacred trust" of social policy. Rather, they will look for guarantees that are more binding.[26]

How?

The Canadian constitutional tradition has been deeply influenced by both U.S. and British models, as well as responding to the country's unique needs. The idea of the supremacy of Parliament came from the United Kingdom and the ideas of federalism and the entrenchment of individual rights from the United States. To some extent, these principles are contradictory, and the tensions of those contradictions find expression in never-ending disputes over federal and provincial jurisdiction and in the continuing controversy over the notwithstanding clause in the 1982 Constitution. Canadians have also evolved their own constitutional arrangements, such as executive federalism, to cope with the regional tensions of the federation, and their constitutional tradition has always had to deal creatively with the reality of two major linguistic groups. In the future, Canadian constitutional tradition will have to be even more innovative to accommodate the legitimate concerns of native peoples, who have been excluded for so long from meaningful participation.

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26 Some people in Ottawa may be tempted to think that the Meech Lake strategy, of increasing the perceived cost of failure of negotiations in order to force agreement, might work this time around if the stakes involved are higher and if the deadline for ratification is shorter. Although it is possible to imagine that a sufficiently great sense of national crisis might produce a federal-provincial agreement, one would have to be dreaming to think that it could be rammed through seven legislatures plus the Senate without a huge public outcry. Moreover, even if ratification were forced through, the game would continue. Hardline separatists in Quebec will never accept "renewed federation" and would remain alert for slights. And future political debates would surely provide such slights if a substantial number of citizens of the rest of Canada felt that their vision of the country had been compromised in order to keep Quebec in Confederation.

As we suggested earlier, one can think of the Constitution as the legal framework for the evolving social contract. Such a framework is only partly a means of constructing efficient arrangements for the operation of government. It is also partly an expression of mistrust of government. The framers of the U.S. constitution wrote significant limits on what that country's governments were allowed to do because they did not trust them to remain within the limits of the social contract as it then existed. Of course, the individual rights listed reflected the contemporary, fairly narrow idea of citizenship, which effectively excluded many people, notably slaves and women.

To many in Canada today, the idea of entrenching individual rights in the Constitution and enforcing those rights through the court system is appealing, since they also do not trust government always to deal appropriately with the rights they consider important. The social contract of the 1990s is, however, far more inclusive than the social contract of 200 years ago, both in who is considered a full citizen and in what full citizenship means. Hence, the constitutional entrenchment of citizenship rights is more complex now than it was two centuries ago. Furthermore, some Canadians oppose, on principle, the entrenchment of individual rights because it may produce an increasingly litigious society in which more of the real decisions are made by unelected judges and in which constitutional practice evolves on a case-by-case basis, unfettered by coherent design or by the concerns of society in general.[27]

An alternative model is that of the United Kingdom, where Parliament is supreme. There is no limit to its power to intervene as

27 All the same, one must recognize that Canada already has a Charter of Rights and Freedoms and policy setting by judicial interpretation. The problem is that the current set of judicial interpretations of social policy is driven by a very narrow list of rights, essentially involving procedural equity and the right to nondiscriminatory treatment — which can be satisfied by "an equal right to nothing." Hence, one hears Ottawa bureaucrats talk of "Charter-proofing" legislation. (Although it might be socially desirable to provide, for example, financial assistance through CPP to widows under age 65, it would be expensive to provide such benefits to widowers or to all people, yet the Charter says one cannot discriminate on the basis of sex or marital status.) The current Charter is already producing increased litigiousness and judicial policy setting, although within a very narrow concept of rights.

it pleases, so the legislative process can give immediate expression to *any* desired changes in the social contract. If one parliament goes beyond the social consensus, it can be replaced and its decisions repealed by the next one. The flexibility of the parliamentary system and its potential for continual revision of the social contract can be viewed as either facilitating the effective expression of popular will or as opening the door to reneging on the social contract and continual social and political instability.

In a federal state, such as Canada, the necessity of dividing jurisdictions among levels of government imposes some constraints on each parliament, federal or provincial, and creates a powerful role for the judiciary, that of arbitrating disputes over jurisdiction. Indeed, one might have thought that the necessity of obtaining federal-provincial agreement for changes in social policy would function as a quasi-guarantee of stability in social legislation. However, the federal government's revisions to Established Programs Financing and the Canada Assistance Plan indicate that in practice the social policy framework can be substantially altered by unilateral federal action.

Canadians who have little mistrust of government intervention in market processes and few anxieties about social and political instability tend to be impressed by the flexibility of the parliamentary tradition and to argue that constitutional arrangements in a federal state should be mostly about the division of jurisdictional responsibility, with a minimum of constitutional restrictions on governments' authority to solve problems of equity and efficiency as expeditiously as possible. Those who are concerned that governments may renege on their commitments to decent living standards for the economically disadvantaged, on the other hand, argue for constitutional entrenchment of social and economic rights.

The *Constitution Act, 1982* blended both the U.S. and the British traditions, and part of the current process of constitutional review is essentially a debate on which elements should receive greater emphasis in a new Constitution. But it should be clear that Canada can choose a social charter that follows either the U.S. or the British

model or an alternative that falls somewhere in between. Thus, the argument about having a social charter need not depend on preferences, for example, for a more or less litigious society. The following sketches of how a social charter might work illustrate the range of possibilities available.

The Panel of Experts Approach

The social charter adopted by the Council of Europe in 1961 represents a more administrative route than the judicial enforcement of the U.S. model or the parliamentary supremacy of the British approach. Participating countries agreed to ratify a core of articles plus a minimum fraction of all articles proposed.[28] The operation of the European charter involves three stages: (1) every two years, participating countries must report on progress made with respect to each of the charter provisions; (2) country reports are evaluated by a team of social experts; and (3) both progress reports and expert evaluations are sent to a political board with representation from each of the member countries.

The European charter has the advantage of not requiring expensive litigation and a lengthy appeal process. Furthermore, it avoids the setting of social policy on a case-by-case basis; expert evaluations can consider the impact of each case or design features of the system as a whole. Such a form is likely one of the most easily

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28 These included, among others, the right to work (article 1); the right to just conditions of work (article 2); the right to fair remuneration, including "the right of men and women workers to equal pay for work of equal value" (article 4); the right to organize (article 5); the right of children and young persons to protection (article 7); the right to protection of health (article 11); the right to social security (article 12); the right of the family to social and economic protection (article 16); and the right of mothers and children to social and economic protection (article 17).

The decision to allow participation on the basis of at least a minimum commitment to the social charter was taken to encourage a maximum number of countries to agree to the charter. In the Canadian context, this mechanism might encourage all provinces to agree on the idea of a social charter even if unanimity could not be obtained on all items.

acceptable a social charter could take,[29] especially in its minimum participation version. Disadvantages include the possibility of limited effectiveness and thus limited support from those who are currently suspicious of elected governments.

A Social Rights Commissioner

A variant of the European model would be to replace the three-tier evaluation process with a social rights commissioner reporting annually to Parliament on the attainment of the objectives of a social charter. Canada already has a number of models for such an institution: consider, for example, auditors general and human rights commissioners. The effectiveness of the process would depend on the social rights commissioner's having the authority to investigate potential breaches of social and economic rights even in cases for which no claim has been filed. Such investigative authority seems especially important for disadvantaged groups, such as women and natives, that have had limited success in effectively claiming these rights in the past.[30]

A potential problem with this approach is the possibility of political patronage in appointments. As in the case of the federal auditor general, however, this difficulty could presumably be overcome — for example, through requiring that the appointment be approved by an all-party committee.

A Fully Justiciable Charter

Alternatively, one might argue for a fully justiciable charter. This choice would be the most likely to avoid current suspicions of elected officials. Such a charter could increase believability in its effective-

29 That is, most easily acceptable by provincial governments.

30 An example of the importance of this investigative authority can be found in the early history of Canadian equal pay legislation. Despite the presence of laws on the books, individuals made few successful claims.

ness by making it possible for groups disadvantaged by some new policy to take court action against the government or governments involved. Again, however, it is important to remember that some currently disadvantaged groups are uncomfortable with and/or have inadequate access to the legal process.[31]

If fully justiciable social and economic rights were embedded in a new Constitution, the costs would include an increased propensity to litigation in social policy issues, some degree of judicial uncertainty, and a tendency for social policy to evolve as the result of a series of case-by-case decisions, rather than as the result of an overall design. The benefits, however, would include court recognition of individual cases, even cases of very unusual individuals. Those whose situation may simply not be perceived, even by the best-intentioned social policy planner, would have an avenue of redress. Another final advantage of operationalizing a social charter through the courts is that the legal process offers an established procedure for weighing conflicting claims, though decisions would ultimately depend on the judge.

Justiciable Right to Effective Policies

A fourth option is to conceive of social and economic rights as the justiciable right to effective *policies* that maintain constitutionally specified social and economic entitlements for all citizens. Each individual would have the right to turn to the court system for a finding of fact that effective policies had not been implemented. The courts would be limited to findings of fact and jurisdiction — that is, whether the constitutional entitlements of citizens were or were not being met and which level (or levels) of government was responsible. With this version of a justiciable charter, the courts would not be in the business of prescribing remedies, other than requiring that

31 Women and natives, two groups that experience substantial economic disadvantage, are often heard to complain that the current legal system does not deal fairly or appropriately with their concerns.

government come up with an effective policy; hence, policy design would remain a political function.

Conclusion

Since the political arena is increasingly dominated by the eight-second sound bite and the 30-second television commercial, one has to face the fact that it is not well suited to the task of evaluating complex arguments or adjudicating disputed issues of fact. However, politics is the arena in which broad visions of the future are articulated and conflicting values are traded off. In constitutional design, Canadians should be trying to assign to each particular institution the sort of tasks it can be expected to do well. Any of the social charter options described offers a potential venue for dispassionate, extended analysis of complex evidence outside the political process, but with the exception of the fully justiciable option, the final solution to identified problems is left to the political process, which we feel is best suited to overall policy design.

Whichever version of a social charter is chosen, it should provide individuals with the right to present evidence — to a court, an expert panel, or social commissioner — that policies are not working and to have that evidence carefully considered in an open forum. Additionally, since some groups have historically had little success in establishing claims to their rights, a social charter should allow for the possibility of third-party investigation and representation. If the policies are found to have failed, government would have to revise them, but it would retain the right to find distinctive solutions that fit in with the other social, cultural, and economic imperatives of its community. Canadians could expect a diversity of policy models,[32] but they could also expect that all these policies would have to satisfy

32 For example, if a right to shelter were entrenched, sincerely held beliefs about which policy actually works might lead some governments to adopt a policy of abolition of rent controls and zoning restrictions while others might opt for more public housing.

a core list of objectives, in addition to any other objectives of the community involved.

Whatever the route chosen, it is essential that the process make some provision for the disadvantaged. A community is something more than simply a race for personal, individual success. The existing Constitution enjoins both federal and provincial governments to promote equality of opportunity [article 36(1)], but even if greater equality of opportunity makes the starting line more even, some people are born handicapped or become disabled and are unable to compete economically. These people are still members of the community, and they still have rights, which are the responsibility of all Canadians to protect.

If access to a minimum standard of living for those unable to advance economically is a reasonable requirement in any civilized society, then social and economic rights should be entrenched in the Constitution and explicitly guaranteed. So long as social and economic rights are credibly and effectively guaranteed, the exact form such guarantees take is a matter for discussion. If such rights are not embedded constitutionally, the risk of myopic reneging on the social contract will remain, and Canadians' sense of national citizenship may become an early casualty of constitutional reform.

What Rights?

When we speak of a social charter, what do we have in mind? What rights should such a charter enumerate? What degree of specificity should it contain?

As an illustration of the level of generality we have in mind, consider Articles 22 to 28 of the United Nations Universal Declaration of Human Rights (see the appendix).[33] It is instructive to ask

33 We are not suggesting, however, that one would wish to adopt that language unamended. The Universal Declaration was written in 1948, before the era of gender-neutral language. Although article 2 specifies that all provisions apply equally to male and female persons, in 1992 one would not write, for example, "economic, social and cultural rights indispensable for his dignity and the free development of his personality."

whether the substance of these articles has stood the test of time. Those that refer to underlying human needs seem to have retained their validity, while those that refer to the mechanisms by which individuals attempt to fulfill their needs may have become less appropriate as the institutional structure of social and economic life has changed.

Articles 23 and 24, for example, refer to the right to work, to choose employment freely, to receive equal pay for equal work, the right to join trade unions, and to have rest, leisure, and holidays with pay. Article 23(3) specifies the right to remuneration sufficient to ensure the worker a decent standard of life "for himself and his family." Clearly, the single-earner family is envisaged. More generally, the implicit institutional framework is a society in which the vast majority of workers are involved in a wage-labor relationship with a specific employer. It is not clear what these articles can mean if the labor market is increasingly characterized by self-employment.

Article 25, however, refers to the enduring human need for a standard of living adequate for health and well-being, specifically mentioning the primary goods of food, clothing, housing, medical care, and social services, as well as some sort of "security in the event of unemployment, sickness, disability, widowhood, old age or other loss of livelihood" beyond the individual's control. And article 25(2) specifies special consideration for motherhood and childhood, something that can be seen as essential in any society. In our view, article 25 has stood the test of time, since it refers to underlying human needs that do not change and expresses the underlying social value that a civilized society should ensure that all the members of the social community receive the necessities of life.

In thinking about the necessities of life, we agree with Adam Smith, who wrote more than 200 years ago:

> By necessaries I understand, not only the commodities which are indispensably necessary for the support of life, but whatever the custom of the country renders it indecent for creditable people, even of the lowest order, to be without....Under necessaries therefore, I comprehend, not only those things which

> nature, but those things which the established rules of decency have rendered necessary to the lowest rank of people.[34]

Since the "established rules of decency" evolve over time as living standards change, a social charter must use fairly general language. It is the enforcement mechanisms of the charter — either the reports of the social rights commissioner or the court decisions enforcing judicially entrenched social and economic rights — that will give concrete meaning to the concept of a standard of living adequate for health and well-being.

Over time, the general language of a social charter undoubtedly would be supplemented by a succession of findings that traced out its specific implications, in much the same way as successive court decisions in the United States have spelled out the concrete meanings of that country's constitutional prohibition of "cruel and unusual punishment." Over time, evolving case law would reinterpret old precedents in the light of new values and new constraints.

A social charter would affect the terms in which policy debate is cast and would provide greater legitimacy for the concerns of groups, such as the homeless, that now have to struggle to remain on the policy agenda, but a social charter would not end politics. Conflicting views about appropriate policy are an essential feature of democratic political life. In the long term, the function of a social charter would be to articulate general values and to specify the adequacy of existing policy in meeting basic human needs in order to provide a broad guide to the evolution of policy. In the short term, by specifically enumerating the right for housing and medical care, a social charter could help to protect existing rights to medicare and to expand the right of the homeless to some form of shelter.

The Canadian Constitution can be read as already implying some social rights. For example, articles 26 and 27 of the U.N. Universal Declaration of Human Rights refer to individuals' rights to education and to free participation in the social and cultural life

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34 Adam Smith, *The Wealth of Nations* (1776; reprint E. Cummings, ed., London: University Paperbacks, Methuen, 1961, 2 vol.), p. 400.

of the community. If the existing article 36(1) of the Canadian Constitution, which refers to the joint responsibility of federal and provincial governments for the equality of opportunity of individual Canadians, were shorn of its qualifying phrases about jurisdiction,[35] the right to education might be considered to be subsumed under the right to equality of opportunity. Similarly, the U.N. provisions that "higher education shall be equally accessible to all on the basis of merit" [article 26(1)] and "everyone has the right freely to participate in the cultural life of the community" (article 27) might be considered particular applications of the existing Canadian Charter rights to nondiscriminatory treatment.

Yet saying that one could derive social and economic rights from Canada's present Constitution really represents another way of saying that the social and economic rights enumerated by the U.N. Universal Declaration of Human Rights are intimately related to the personal legal and political rights already in the Canadian Charter of Rights and Freedoms. Fundamentally, we argue — and Canada has already recognized, in voting for U.N. General Assembly Resolution 32/130 — that "the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."[36] For this reason and because acceptance of social responsibility is an essential Canadian value, Canada needs a social charter that *explicitly* recognizes the social and economic rights of Canadian citizenship.

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35 "Without altering the legislative authority of Parliament or any of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority."

36 United Nations, General Assembly, Resolution 32/130, b.

Toward Prosperity, Equity, and Consensus: *The Case for a Canadian Charter of Social and Economic Rights*

Havi Echenberg and Arthur Milner

This paper consists of five parts. The first looks briefly at Canada's current problems — social, economic, and constitutional — and sets forth some basic principles and approaches for dealing with them. The second section looks at one such approach, a charter of social and economic rights, and how it would measure up as economic and social policy. The third section briefly considers the constitutional effects of such a charter, the fourth outlines some of the legal background, and the fifth makes the case for having such a charter "justiciable" (a law that people can "take to court").

The Economic and Social Context

By any standard, Canadians are fortunate. Numerous studies put Canada at or near the top of the world scale for quality of life. International leaders — most recently Germany's Helmut Kohl — wonder what all the fuss is about. Why are Canadians always complaining? Why do they seem intent on tearing their country apart? Why can't they just get on with living in their peaceful, clean, and prosperous land?

From the inside, Canadians know that things are not quite so rosy, however. Large regional inequities exist and are increasing.

Certain groups — in particular, natives and single women with children — live in absolute poverty amid the wealth. And longstanding demands for increased power or autonomy — in Western Canada as well as in Quebec and among native people — continue to rattle the foundations of the nation.

On the economic front, the future is equally precarious. Canada's wealth has always rested on its resources. Through a combination of neglect (such as mismanagement of forests and fisheries) and bad luck (such as falling commodity prices), those natural riches no longer guarantee prosperity.

The Need for Consensus

Today there is finally some agreement on the diagnosis of Canada's economic ailment: despite individual successes, the nation has been unable to make the transition to the high-value-added economy required in these days of increased international competition. Both the Ontario New Democratic Party (NDP) government, in its 1991 budget speech, and the federal Progressive Conservative government, in its 1991 throne speech, acknowledged the demands of international competition and called for better education, skills training, and increased investment in research and development.

Unfortunately, economies are complex creatures that do not respond to commands. Beyond agreement that Canada needs increased investment in human resources, research, equipment, and production methods, there is little consensus and often outright hostility about how to reach these goals.

Business and the Conservatives argue, for example, that eliminating barriers between Canada, the United States, and now Mexico is an absolute necessity; labor and the NDP believe that these free trade agreements threaten Canadian jobs, prosperity, and autonomy. The right believes that the goods and services tax (GST) is a necessary replacement for the outdated manufacturers' sales tax that favored foreign over domestic manufacturing; the left argues that the GST redistributes wealth to the rich. The right argues that high interest

rates are required to reduce inflation; the left believes that they increase unemployment. That both sides are correct on these issues has not helped them reach a consensus about policy.

This lack of consensus makes difficult situations worse. For example, the left's opposition to the GST has heightened the tax's negative effects by encouraging noncompliance; tax avoidance through cross-border shopping has been turned into a heroic act. Sound economic policies[1] are unlikely to achieve their intended goals unless they are accompanied by political and social consensus.

International Economic Lessons

International experience offers a number of clear lessons:

- Poor countries distribute wealth badly and/or become undemocratic.
- Rich countries that do not adapt to changing markets become poorer.
- To compete successfully, business must have the flexibility to respond to changing markets. Flexibility requires that people be confident that they will not suffer unduly or disproportionately as changes are made.

One must conclude that equity is a prerequisite for prosperity, that prosperity is a prerequisite for equity, and that consensus is a prerequisite for both.

Labor cannot be forced to agree to flexibility. Business cannot be forced to invest wisely. Unless business and labor reach a rough and evolving consensus on social and economic objectives, both will lose.

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1 Such as the GST, in our view.

The Social and Economic Policy Context

There is no easy cure, no single big change that will solve Canada's problems. Rather, a large number of smaller changes can, we believe, help Canadians deal with the problems confronting them. One of these helpful changes would be a charter of social and economic rights.

Building Consensus

As the country's major economic partners, business and organized labor have the tools available, albeit unequally, to influence the determination of economic policy. If business is unhappy with government decisions, it can lay off workers or move its plants and offices to another jurisdiction. If labor is unhappy, it can strike or institute work slowdowns. Both of these methods of influencing decisionmaking are, of course, disruptive and injurious to both prosperity and equity. Consensus building requires that business and labor meet, talk, and reach agreements that are acceptable to both. Countries with a more consensual approach to politics than Canada have many institutions that bring these opposing interests together. Canada has few.

Reaching consensus requires more than discussion, however. Business must be assured that it will have flexibility, access to markets, low inflation, stable interest rates, and so on. Labor unions need confidence that their members will not suffer as a result of flexibility, and that their rights will be respected. It is here that a charter of social and economic rights could play a crucial role.

Marginalized Groups and Underclasses

Canadian society can be understood as comprising three distinct socioeconomic groups: the mainstream, the marginalized, and the underclasses. The mainstream consists of those who have a more or less secure income from more or less secure employment at more or

less decent wages. The marginalized, who may be working or on social assistance, have low incomes. Members of the underclasses have few institutional connections with the mainstream — except perhaps through prisons and psychiatric institutions — and are essentially lost to society and the economy.

The moral reasons for assisting people on the margins are clear. There are equally good economic reasons. Given the opportunity, the marginalized can enter the mainstream. The availability of a job or a training program can provide a path. But the absence of options makes life on the margins unbearable. One can live there only so long; without options — without hope — people fall off the margins into the underclass.

Members of the underclasses may be lost forever. At the very least, they require extensive counseling — often for addiction, sexual abuse, or violence — before re-entering productive society. Centrally designed programs are often ineffective, and solutions are difficult to find and expensive to support. Reducing movement from the margins to the underclasses is, therefore, an important economic goal.

So too is reducing movement from the mainstream to the margins. Most workers are only a job away from marginalization. So long as this situation exists, workers will be understandably reluctant to welcome business flexibility. If new equipment, production methods, or environmental legislation mean loss of wages, pensions, and homes, individual workers will fight change, even if it is in the long-term interests of society as a whole. If, on the other hand, training and other programs that ease job transition are in place, an impediment to flexibility will be removed. Training programs will, however, keep people from falling into the margins only if there is the real possibility of a job at the end. For this reason, full employment must be a societal priority,[2] and the right to a job must be part of any charter of social and economic rights.

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2 Most Canadian economists define "full employment" as the level of employment that will not generate inflation, now said to require unemployment levels of about 8 percent. We believe, however, that "full employment" means just that — a job for everyone who wants one — and that other means must be found to fight...

Marginalized groups and the underclasses in Canada have had a limited role in economic and social policymaking. In recent years, however, organizations representing some of these interests have become more effective, partly as a result of using courts and tribunals to enforce rights guaranteed in human rights codes and in the Charter of Rights and Freedoms. And, at least partly as a result of the Charter, Canadian governments have undertaken greater consultation with these groups in an effort to make more effective legislation and programs aimed at integrating them. A charter of social and economic rights would make such consultation more extensive and meaningful, given the broader and more difficult entitlements that such a charter would enshrine. Consideration of the interests of those at the margins would result in less fear of economic marginalization and more socially integrated and stable communities, which would mean fewer artificial barriers and an increasing number of participants in a healthier economy.

Maintaining the Economic and Social Infrastructure

Guarantees of social and economic rights would protect Canadians' access to social programs and thus dampen efforts to savage the social infrastructure for short-term economic benefits. As the globalization of the economy continues, pressure to reduce government spending and to lower minimum standards in labor relations, the environment, health care, and education will increase. But the demands of short-term competitiveness cannot be allowed to result in short-sighted destruction of — or failure to develop — social institutions. Saving money at the expense of education, health care, child care, and so on will result in fewer skilled participants in the labor force.

Note 2 - cont'd.

...inflation. See Pierre Fortin, "Credibility, Controls, or Consensus: Is Full Employment without Inflation Out of Reach in Canada?" in John Richards, Robert D. Cairns, and Larry Pratt, *Social Democracy without Illusions: Renewal of the Canadian Left* (Toronto: McClelland and Stewart, 1991).

Maintaining and developing the infrastructure is in Canada's economic best interests. Just as allowing highways or sewers to fall apart is dangerous, resulting in higher costs down the line, so too is permitting the deterioration of schools or hospitals.

Encouraging a Flexible Labor Force

Because a charter of social and economic rights would guarantee the right to social and economic participation, it would commit government to making concerted efforts to develop all potential labor force participants.

Labor adjustment is one of the few areas in which the federal government is claiming constitutional room to maneuver and is willing to find the necessary funding. Yet many segments of the population are still effectively excluded from training programs. For example, women with dependent children or parents are generally unable to find (or afford) the support they need to free them for work or training. Few training programs are located in buildings accessible to those with mobility impairments. Few programs provide literacy training or are available to those who can attend only part time. The most successful and accessible training programs have the longest waiting lists.

The net effect is that significant segments of the population are job-willing but not job-ready. As the economy grows, skilled labor is unavailable, and those ready to learn the skills are unable to do so. A charter of social and economic rights would commit government — in conjunction with business and labor — to developing programs and initiatives that would provide the approaches and training needed to reach all those Canadians ready and willing to work.

Expanding the Economic Team

By establishing entitlement to social and economic participation, government would be saying to all citizens: You have a right to share in our activity as well as our wealth. You are us. Most Canadians

already exercise that right; a charter would be a formal invitation to those previously excluded.

Participation in mainstream institutions prevents the creation of underclasses. It also mitigates xenophobia and racism and encourages respect and understanding for the position of opponents — political or other — as differences dissipate with the emergence of common ground and culture.

The best way to break down barriers is to give each participant responsibility for the whole. Once people have a claim on the whole — in this case, the economy — it is more likely that they will accept responsibility for its nurturing and growth.

Initiating Upward Harmonization

Used as a tool in international negotiation, a charter of social and economic rights could contribute to upward harmonization, so that social and environmental standards are not gutted as domestic economies become globalized. Adam Smith, often quoted by those most in favor of the fewest constraints on private markets, understood the social ignorance of capital markets and suggested that the state is responsible for mitigating their negative impacts. Until now, domestic governments have undertaken such offsetting initiatives, but they are no longer sufficient.

A charter of social and economic rights would serve domestic interests in significant ways here. It could also provide a helpful base for negotiations with countries with which Canada is seeking closer economic relations. For example, had such a charter been in effect when the Canada-U.S. Free Trade Agreement was being negotiated, it would have been clear to Canadians which social and economic programs were on the table.

It is worth noting that opposition parties in Mexico are seeking to establish some sort of charter of social and economic rights as a precautionary move as their country enters trade negotiations with the United States and Canada. The European Community is also

working toward a justiciable social charter that will articulate standards for social, health, environmental, and cultural programs. Similarly, a Canadian charter could provide the starting point for negotiations with other nations as Canada seeks fewer trade restrictions.

The Constitutional Context

Canadians seem to be making little progress in finding a constitution upon which they can agree. The economic crunch has created impetus for reconsidering all rights of citizenship, all obligations of and to the state, all the expectations of the major economic partners. A social contract in the form of a charter of social and economic rights could help in reaching constitutional agreement because it would require discussion and re-establish an understanding of social rights and goals.

It is important that a charter be sovereignty-neutral with regard to the status of Quebec. That is, a charter might establish the grounds from which a renewed federalism could emerge. Alternatively, it could provide an article of association between Canada and a sovereign Quebec, an agreement to accompany articles of economic association or union.

The Legal Context

Although a charter of social and economic rights is often seen as a radical departure from the "Canadian way" of making policy, it need not unduly restrict the policy-making authority of legislatures. We suggest that a Canadian charter be based on the International Covenant on Economic, Social and Cultural Rights, which is general and philosophical in nature. Even the most specific clauses leave room for domestic decisions on implementation. Like the Covenant, a Canadian social charter could and should stop short of outlining how the rights it lists would be administered or guaranteed. As part

of a constitution, it should leave as much room for flexibility as is consistent with the basic guarantees that are a right of citizenship.[3]

Calling the Economic Shots in a Charter Environment

A charter of social and economic rights would oblige governments and other partners in the economy to enhance — and ultimately provide opportunities for — economic and social participation for all citizens by setting a broad direction for economic policy. It would also give individuals and groups a way to be heard when their interests are being sacrificed for the "greater good." The interests of the collective should be limited by the exclusion of individuals, intended or unintended, from social and economic participation. Although the interests of the majority are important and most likely paramount, they should never be allowed to run roughshod over the interests of the individuals who are being excluded in deference to the majority. That is, after all, what charters of rights are for.

The fear that a charter of social and economic rights would prevent Canadian governments from exercising decisionmaking authority is exaggerated. No one intends that a charter paralyze governments or limit their room to maneuver. They would be left to determine the best approach by which to achieve social and economic participation. The development of economic policy that did not serve the interests of equity as well as prosperity would, however, be limited.

As with any legislated or constitutional right, an adjudicative body would exercise a test of reasonableness. Indeed, if it were broadly agreed that a legislature should have the power to override individual rights in certain cases, as long as it did so thoughtfully and intentionally, the charter could include a "notwithstanding"

3 Although recent Canadian history may suggest that constitutions are transient but that amendments are impossible, the preferred model calls for a permanent constitution that can be amended as necessary.

clause — though governments would have to recognize that they would have much explaining to do if they invoked it. Further, a charter would never limit government's ability to act in a crisis; litigation takes so long that the emergency would have passed before the challenge and appeals could be adjudicated.

A charter of social and economic rights could give people who are not adequately represented an opportunity to claim their right to economic and social participation. The main advantage to powerless groups, however, would be the requirement that government and other economic players take into account their right to economic and social participation as policy and programs are developed. The expression of the rights carries a great deal of weight, even if they are not litigated. Litigation is a last-resort strategy, not a first-round initiative.

International Legal Obligations

Canada is already obligated by international law to goals and directions that a charter of social and economic rights would contain. In 1948, the United Nations adopted the Universal Declaration of Human Rights, listing civil, political, social, economic, and cultural rights. As a result of political pressure, the U.N. divided these rights into two groups when they were described in greater detail in the more binding international covenants that were passed in 1966:

- *The International Covenant on Civil and Political Rights*. This document contains those rights with which Canadians are familiar: for example, freedom of association, expression, and religion, and equality under the law.
- *The International Covenant on Economic, Social and Cultural Rights*. Recognizing that civil and political rights are not truly meaningful unless the social and economic participation of all citizens is also respected, the U.N. passed a covenant stating that each person has the right to a reasonable standard of living, to

> food, clothing, and adequate shelter, and to medical care, education, and social security.[4]

Canada voted in favor of the 1948 declaration, and Parliament ratified both of the covenants in 1976.

In addition, Canada's prime minister was a leader in getting U.N. passage and ratification of the International Convention on the Rights of the Child, which requires all jurisdictions in the signing countries to dedicate their economies to complete economic and social security for children and their families.[5]

Domestic Legal Obligations

Canada is also already obligated by a variety of domestic laws, federal and provincial, to uphold many of the rights a charter of social and economic rights would contain.

Popular history has it that the architects of the Canadian Charter of Rights and Freedoms considered and rejected the explicit inclusion of such rights (on the grounds that specifying them would limit the power of the legislatures). Nevertheless, the Charter has several clauses in which the courts, if they wish, could read social and economic rights into its coverage. And given that the courts are

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4 The same political pressure contributed to the development of separate mechanisms for "enforcement" of the two groups of rights. The United Nations Human Rights Committee monitors and makes public statements about the extent to which countries that have ratified the International Covenant on Civil and Political Rights have complied with its provisions. Ratifying countries were — and are — expected to comply immediately. In contrast, "progressive achievement" is allowed for compliance with the Covenant on Economic, Social and Cultural Rights, and countries' meeting of obligations is judged relative to the resources available during periodic reviews by a separate subcommittee of the Human Rights Committee.

5 The Convention is not enforceable in domestic or international courts or adjudicative bodies until member nations sign it.

Since conventions are more binding than covenants and require compliance of domestic law before ratification by provincial and federal governments, Canada has not yet signed the Convention. All Canadian jurisdictions are, however, in the process of bringing their legislation into compliance with it.

inclined to use Canada's international obligations as guiding principles within which domestic law should be understood, some judges have already expressed their willingness to consider the Charter in the context of the International Covenant on Economic, Social and Cultural Rights.[6]

Particularly in light of international obligations, section 7 of the Charter, which describes each Canadian's entitlement to life, liberty, and security of the person, could be interpreted to include economic security. The Supreme Court of Canada has expressed its willingness to consider such an interpretation in a case brought before it.[7]

Furthermore, the Supreme Court has already interpreted the equality provisions of the Charter (sections 15 and 23) as intended for argument from the perspective of disadvantage by groups seeking equality.[8] Disadvantaged groups, including women, nonwhites, the disabled, and people in prisons, that were arguing before tribunals and lower courts have used these sections successfully in seeking to combat discrimination in social and economic programs and institutions as well as in the narrower civil and political sphere intentionally covered in the Charter.

Similarly, provincial and federal human rights legislation prohibits discrimination against certain groups in all services and institutions that are normally available to the public, including social and economic institutions, even though these laws do not explicitly articulate social and economic rights.

Enforcing a Charter: Courts or Legislatures?

Domestic constitutions that entrench social and economic rights are relatively common in Europe, which may explain the relative alacrity with which the European Community is seeking to enshrine

6 [1982] 2 S.C.R. 368.

7 *Irwin Toy v. A.G. Quebec*, [1989] 1 S.C.R. 927.

8 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, 10 C.H.R.R. D/5719.

social and economic rights continent-wide. It is important to note, however, that most of these instruments are not justiciable (that is, they are not rights that individuals or groups can "take to court"). Rather, they simply express the collective will with regard to the right of individuals to social and economic participation within the whole.

Similarly, a Canadian charter, whether justiciable or not, should enshrine the rights of Canadians to full participation in the economic and social spheres. Although such rights may seem to be implicit, many segments of Canadian society are effectively denied them, and continued economic pressure will most likely increase the numbers.

Since most nations that have enshrined these rights have not made them legal instruments that can be tested and enforced in courts or tribunals of law, there is an absence of experience to draw on.

Some people are concerned about leaving to unelected judges the final decisionmaking authority with regard to social and economic rights, particularly when such courts are not restricted from issuing remedies that could supplant or restrict the economic policymaking authority and responsibility of elected legislatures. The argument goes, if citizens want government to create more economic opportunity and more equity, they can elect a government that will do so.

The concern here is real. Parliament is, after all, intended to be the key institution in which Canadians seek consensus. In it, various views are represented and debated, and, in theory, the demands of different classes, linguistic groups, provinces and regions, and interest groups are reconciled and a consensus is built.[9]

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9 In reality, if there is a consensus among Canadians these days, it is that their political institutions represent them poorly. There is, however, little consensus about how representation could be improved. Canadian governments often win strong parliamentary majorities with less than 40 percent of the vote. As a result, legislation is often passed by governments that do not represent a majority of electors. Further, since it is possible for a party to win 20 percent of the national vote and not elect a single member, it is very difficult to form new parties.

We recommend that Canada adopt proportional representation. Most democracies provide such a system, which allows the formation of new parties and assures that parties are represented in proportion to votes cast. Because absolute majorities are rare and minority governments the rule, compromise is encouraged, and legislation cannot be passed unless it is supported by parties representing a majority of electors.

Yet justiciable rights would not — and would not be intended to — supplant the power of legislatures. But they would help those groups that are and are likely to remain powerless and poorly represented.

In addition, even nonjusticiable rights affect judicial decisions to some extent. Canadian courts are already reading domestic legislation, including the Charter of Rights and Freedoms, in the context of the International Covenant on Economic, Social and Cultural Rights. Should such rights be made explicit in Canadian law (especially in the Constitution) even in a nonjusticiable form, they could reasonably be expected to lead Canadian courts to read social and economic rights into the existing Charter and human rights codes.

The better way to safeguard the power of the legislatures might be to make the rights justiciable but limit the authority of the adjudicative body. It is possible (though not uncomplicated) to design a body that would serve as the final arbiter in questions of social and economic rights but be limited to determining compliance or noncompliance with the charter, requiring government to report back with a remedy.[10] In this way, the integrity of elected governments could be combined with a justiciable charter.

Such an arrangement would institutionalize an existing tendency. Both the Canadian and the U.S. Supreme Courts have been reluctant to interfere with the power of legislatures. They are more likely to point out the violation of the right and leave it to the legislature to determine how the violation should be remedied.

Moreover, there are good reasons to encourage the litigation that comes with justiciability. The most important is the natural instinct of government to design and develop programs that will not be the subject of litigation. In Canada today, this tendency leads to what is known as "Charter-proofing": government anticipates that any violation of the Charter of Rights and Freedoms will lead to

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10 Appointments to such a body could be made by all-party committees of Parliament, rather than by the government alone.

expensive and time-consuming litigation and therefore gives it full consideration in the design and development of legislation.[11]

Critics of a charter of social and economic rights make another, more subtle point. They fear that it would shift public debate into the back rooms of government and into the courts. Rather than debating a proposed policy in public, the argument goes, proponents would use the charter to force legislation through the courts. Governments would then respond to the courts' decisions, bypassing public debate and consensus building. Canada's record on the public debate of policy is already poor, and it is possible that a justiciable charter of social and economic rights would add another straw to this camel's back. Given the lack of access to power by disadvantaged groups, however, we believe that society cannot justify asking the most powerless in society to initiate discussion on issues important to them while denying them one of the best and often the only means of doing so: taking the government to court.

It should be noted, too, that disadvantaged groups, as they become more sophisticated, are working to ensure that litigation or the threat of litigation is accompanied by a political campaign that seeks legislative, rather than court-ordered, changes to the offending program or legislation. In the event that political pressure does not work, litigation is a strategy of final resort.

Conclusion

Canadian public debate has been largely ineffective at building the consensus that is essential for sound government policy. As a result,

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11 The possibility of litigation also often serves as an important impetus for fine-tuning legislation and programs. No matter how well-intentioned legislators, officials, and drafters of legislation may be, laws and programs almost inevitably have unintended impacts. A program designed to solve one problem may inadvertently create another, which may involve a denial or diminishment of economic or social participation to individuals or groups. A justiciable charter of social and economic rights would give people a way to bring such unintended impacts to the attention of the authorities so that refinements could be made to the program or legislation.

the country has dealt poorly with the important constitutional and economic issues that confront it.

A justiciable charter of social and economic rights would help build consensus by forcing public debate on Canadians' values and goals, by giving direction to social policy, and by helping to create the security people need to survive this period of transition to new economic structures.

A justiciable charter would guarantee the needs of disadvantaged groups' consideration in the policymaking process and provide such groups with a mechanism for placing their concerns on the public agenda.

Finally, a justiciable charter would promote flexibility by promoting equity. It would be a factor in building the consensus that would allow Canadians to move forward to greater prosperity.

Constitutionalizing Social Rights

John Myles

In a remarkable essay first presented at Cambridge in 1949, British sociologist T.H. Marshall pointed out that the history of Western capitalist democracies has been inextricably linked to the development of citizenship — that is, to the rights and entitlements that attach to persons by virtue of their membership in a national community rather than by virtue of their property, status, or market capacity.[1] In the twentieth century, social rights of protection from economic insecurity were added to the civil rights and political rights that had been evolving in the West for more than 250 years. All three were formalized in the United Nations Universal Declaration of Human Rights in 1948.[2]

Among the civil rights identified by Marshall are those necessary for individual freedom: liberty of the person; freedom of speech, thought, and faith; the right to own property and to conclude valid contracts; and the right to justice. Political rights refer to those necessary to participate in the exercise of political power, including the right to vote and the right to hold office. Social rights, for Marshall, refer to the right to a modicum of economic welfare and security and the right to live the life of a civilized being according to the standards prevailing in society.

1 T.H. Marshall, *Class, Citizenship and Social Development* (Chicago: University of Chicago Press, 1964).

2 United Nations, General Assembly, Universal Declaration of Human Rights, December 10, 1948.

Marshall's reading of Western historical development can be extended to suggest that current proposals to constitutionalize social rights in Canada are simply the next logical step in a process that has been under way in Western societies since the seventeenth century. In 1982, Canada constitutionalized civic and political rights. With this step toward constitutional democracy taken, say proponents of a social charter, the time has now come to complete the process and constitutionalize social rights as well.

Social scientists of the 1950s and 1960s would certainly have agreed with this view. During the period of welfare state expansion and the economic boom that lasted from World War II until the early 1970s, the development of social rights appeared to be the natural — indeed, inevitable — result of the ineluctable forces of modernization. With the rise of citizenship, tribal, ethnic, and regional loyalties would give way to new civic identities based on the nation-state. With the advent of social rights, the class-based divisions that separated the owners of property from the propertyless — the traditional Achilles' heel of capitalist democracies — would come to an end.

This postwar orthodoxy was thrown into question in the face of the stagflation of the 1970s. The new economic orthodoxy now asserted that what we needed was less security and more flexibility. The social rights so recently embedded in welfare and labor legislation, we were told, would have to be rationalized, cut back, or abandoned altogether if the Western economies were to achieve their potential.

This revival of neo-liberal orthodoxy was not entirely unexpected.[3] As Marshall and others had pointed out from the beginning,[4] social rights are different. Whereas civil rights are chiefly rights against the state, social rights are claims for protection by the state against markets and the rights of property. Historically, as Osberg and Phipps observe,[5] constitutions have been an expression

3 I use "liberal" here in its traditional sense: favoring a minimalist state and an unfettered market. In today's United States, many people give "conservative" the same meaning.

4 See, for example, C.B. Macpherson, *The Rise and Fall of Economic Justice and Other Papers* (Oxford: Oxford University Press, 1985).

5 See the paper by Lars Osberg and Shelley Phipps in this volume.

of mistrust of government, an attempt to impose limits on what the state can and cannot do in regulating the social, political, and economic activity of its citizens. In contrast, a social charter is an expression of a distrust of markets, an attempt to limit the spheres in which market principles will be allowed to operate and to prescribe the range of socially acceptable outcomes of market-driven processes.

The idea of a social charter for Canadians has been in the air for several years, stimulated in part by the European Community's (EC's) adoption of a new social charter in 1989.[6] To many people, especially those who adhere to the new economic orthodoxy of the 1970s and 1980s, such proposals appear wrong-headed if not downright dangerous. Nevertheless, it is clear that social charters have now become part of the political and social agenda in the developed capitalist democracies and are likely to remain there for some time to come. The main purpose of my comments here is to provide an account of why this movement is occurring. What is the problem the existing welfare states are unable to solve? In my conclusion, I offer some underdeveloped observations on whether a social charter is an adequate response to the problem.

Why Social Rights?

To claim that a social charter is called for at this juncture in Canadian history is to claim that the new economic orthodoxy is wrong. To go forward, Canadians require more protection against markets, not less. They do not get enough from the welfare state programs and

6 The Community Charter of the Fundamental Social Rights (of Workers). Passed by 11 EC members (with the United Kingdom voting against it), the document lists as basic rights: freedom of movement; the right to gainful employment; improvement of living standards and working conditions; the right to social security; the right to organize unions and collective bargaining; the right to training and education; gender equality; the right to co-determination in the factory; the right to health protection and safety standards; the protection of children and youths; and the protection of the aged and the disabled.

other legislation that came to maturity in postwar Canada to protect people against markets.

Of course, as Osberg and Phipps point out,[7] pure capitalism has never really existed in Canada. They might have added that it has rarely existed anywhere else. As Polanyi documents,[8] from the very beginning of modern capitalism, states intervened to regulate the organization of production — for example, with factory legislation governing the use of child labor, with protections for health and safety, with limitations on the hours of work, and so on — as well as the final distribution of income. The idea of a pure self-regulating market has always been an historical fiction, useful for analytical purposes but a fiction nonetheless. As long as there have been markets, there have been welfare states. What has changed is their form. The history of social rights is not one of linear evolution but of rearrangements of the ways governments intervene to organize the production of wealth and its distribution. At issue in both the past and the present is not whether to have a welfare state but what kind of welfare state to have.

The reason for welfare states is not hard to fathom. Unlike pots, pans, or ships, people are not commodities that are produced or destroyed because of their expected value in the market. The only commodity most people have to sell is their labor. Some individuals, such as children and the disabled, have none to offer, and even the able-bodied may face periods when they can find no buyer at a wage sufficient to reproduce themselves or their families. Accordingly, to allow production and distribution to be shaped by the market mechanism alone would, as Polanyi demonstrates,[9] result in the self-annihilation of society. Markets need welfare states or people will die, revolt, or both. Even the most vociferous critics of the current welfare state recognize this fact.[10]

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7 See Osberg and Phipps, in this volume.

8 Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1944), pp. 78ff.

9 Ibid., p. 131.

10 Conservative voices (such as the Fraser Institute) have not been calling for the elimination of the Canadian welfare state but for its restructuring along the lines...

Why a Social Charter?

Welfare states evolve and change. Changing social, economic, and political arrangements make old answers redundant and create new problems in search of new answers. What new problem do proponents of a social charter intend to resolve? Why have social charters become part of the political agenda in the 1990s?

Underlying all such discussions are two factors: the reconstitution of national economic boundaries and the globalization of capital. The distinguishing feature of all welfare states and social rights is their national character. Citizenship and social rights have meaning and force only in relation to a sovereign territorial order.[11] The fact that a new way of institutionalizing social rights — as in a social charter — is now being called for reflects the fact that traditional ways of organizing territorial sovereignty and the economic boundaries between nations are changing throughout the West.

In Europe, recent pressure to adopt a common charter of social rights is a consequence of the projected creation of a single market by January 1993. It is an effort to modernize the 1961 social charter of the Council of Europe, and to extend its scope to take account of the increased level of economic integration that will exist after 1992. In Canada, the question of a social charter emerged in the context of the mid-1980s' debates on a free trade agreement with the United States, and it has re-emerged in both Canada and the United States in the face of discussions over a North American free trade zone that would include Mexico.

The common element in both Europe and North America is anxiety over the consequences of the erosion of national economic

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Note 10 - cont'd.

...of a minimal guaranteed income. And even Hayek can argue that there "is no reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income, or a floor below which nobody need to descend." Friedrich Hayek, *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), p. 87.

11 See Maurizio Ferrera, "Globalization and Systems of Welfare," Fondazione Giovanni Agnelli, Turin, 1990.

boundaries. German workers faced with competing in a single market with Portuguese workers, Swedish workers confronted by incorporation into the EC, and now U.S. workers presented with the possibility of free trade with Mexico — all voice the concerns expressed by Canadian workers in 1988. Will erosion of national economic boundaries lead to downward equalization of social security and labor market rights? Does the abolition of national economic boundaries also mean abolition of national social contracts?

Thus, the concept of a social charter emerges in an attempt to level the international playing field with respect to social rights and labor market regulation, to guarantee similar minimal rights across all participating countries. The purpose is to prevent extreme forms of "social dumping" — that is, downward pressure on standards of social protection as a result of increased competition from countries with substantially lower standards.[12]

It should be clear, however, that the problem that a European or North American social charter is intended to fix is rather different from the problem that a purely national social charter is intended to address. The European social charter is a first step in nation-building, at creating a United States of Europe. In contrast, the proposed constitutionalization of social rights in Canada is an effort at nation-saving, an attempt to put in place a structure to preserve some form of pan-Canadian identity in the face of creeping national dissolution. What should we think of such a proposal?

The concept of social rights can be used in a weak or a strong sense. Social rights in the weak sense exist when legislated entitlements are administered according to uniform standards at a national level and are not subject to administrative discretion or local control. Social rights in the strong sense can be said to exist when they become constitutionalized and "juridified" (made subject to judicial enforcement).[13] Both the Canadian and the U.S. constitutions have juridified

12 Hugh G. Mosley, "The Social Dimension of European Integration," *International Labour Review* 129 (1990): 160.

13 Rights can, of course, be constitutionalized without being juridified. Thus, several authors have identified ways in which Canada could use intermediate forms...

civil and political rights but not social rights. Social policy in Canada, for example, can now be brought into the courts on the basis of age or sex discrimination (civil rights grounds), but not because a social program fails to provide some minimally adequate standard of living.

Thus far, the EC has juridified the free movement of goods, persons, services, and capital — that is, it has created "market citizens" — and member states can be brought to court for violating these freedoms. But full political and social integration of the Community is yet to come, and its 1989 social charter is a purely declaratory document that is not legally binding on member countries.[14] The European experience is instructive, however, for if the EC is to become a nation, both political and social integration will have to follow. For a country like Canada, struggling to maintain its nationhood, Europe provides an important learning ground. The point is not whether social integration can or will be achieved there but what the constitutionalization of social rights would contribute to this process.

The advantage of juridifying social policy in the European context, as Stephan Leibfried notes, arises from the fact that European integration is at its core "unification in law" while taxing,

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Note 13 - cont'd.

...of constitutionalizing social rights that would allow little or no role for the courts. See, for example, Osberg and Phipps, in this volume; and Ontario, Ministry of Intergovernmental Affairs, *A Canadian Social Charter: Making Our Shared Values Stronger* (Toronto, 1991). In this paper, however, I assume that Canadian constitutionalization of social rights would be accompanied by some degree of juridification. Since some other kinds of rights are justiciable, they would inevitably take precedence over nonjusticiable social rights and weaken the latter with respect to the nation-saving goals intended for them.

14 See Stephan Leibfried, "Europe's Could-Be Social State: Social Policy and Post-1992 European Integration" (Paper presented to the conference, "Europe after 1992", Ann Arbor, Mich., September 1991). Yet, as Leibfried has pointed out to me, the 1961 social charter of the Council of Europe is an international legal instrument with some teeth in it, and it has been put to work in, among other countries, the United Kingdom, especially on issues of civil rights, the Irish, and minorities. The European Court of Justice has systematically worked to ensure that when EC citizens are working or traveling in other member states, they are provided the same social rights as nationals of the country being visited.

spending, and organization are left at the national level.[15] In effect, a constitutional approach provides a vehicle for EC integration within an otherwise decentralized state structure. Contrary to the claims of the critics,[16] the virtue of the charter strategy is precisely the room it allows for diversity and experimentation in the pursuit of common social objectives.

For Canadians faced by an impending decentralization of federal powers, the lesson is that constitutionalizing social policy would allow for devolution of taxing, spending, and organizational powers to the provinces, with the simultaneous retention of a common construction of social as well as civic and political citizenship. Thus, if the constitutional reform process led to further devolution of the federal power,[17] the constitutionalizing of social rights would provide the mechanism, perhaps the *sine qua non* for retaining Canada's social identity, as well as a civic and political one. The alternative, the one that dominates the Progressive Conservative government's current proposals for constitutional reform, is devolution of the Canadian identity toward little more than shared membership in a Canadian common market.[18]

There are good reasons, moreover, to think that failure to constitutionalize social rights would pose a greater threat to Canadian nationhood than it would, say, to that of the United States. Historically, social rights have played a marginal role in defining what it means to be an American. In contrast, social policy has been a central element in development of a pan-Canadian identity. Creating a nation out of a country of regions and two founding peoples has always been the major challenge for Canadian political elites, and since the 1920s the welfare state has been the pot of glue used to hold

15 Ibid., p. 15.

16 See, for example, the paper by William B.P. Robson in this volume.

17 The alternative, a recentralization of the Canadian state, could follow from the realization of Quebec's aspirations of distinct nationhood and its becoming a political unit with distinct social rights and a distinct identity. See Robert Brym, "Some Advantages of Canadian Disunity: How Quebec Sovereignty Might Aid Economic Development in English-Speaking Canada," the W.C. Desmond Pacey Lecture, University of New Brunswick, March 1991.

18 Indeed, in the government's proposals of September 1991, maintenance of the economic union of Canada appears to be the chief priority.

the country together[19] — even when party ideology would have dictated otherwise.[20] As Keith Banting observes, in Canada, the welfare state

> is a central component of the politics of national integration on a territorial — as distinct from a class — basis.... Federal welfare programs, whether delivered directly to individuals or through provincial governments are powerful tools of inter-regional redistribution. They represent one of the few ways in which the federal government can fashion appeals that cut across linguistic and regional divisions. As a result social policy reinforces the political legitimacy of a federal state that is under constant pressure from powerful centrifugal forces.[21]

During the 1930s, the inability of poorer provinces and municipalities to meet the relief burden during the Great Depression set in motion a process of "massive centralization" of responsibility for income security in Canada.[22] The alternative to national programs and a high level of interregional transfers was an expansion of provincial jurisdiction that would have reinforced regional differences. Poorer provinces faced the prospect of providing their citizens with lower-than-average benefits or higher-than-average taxes.

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19 Until the 1920s, patronage, rather than the welfare state, was the main instrument used by prime ministers "to create and hold constituency loyalties." David Smith, "Canadian Political Parties and National Integration," in Alain Gagnon and Brian Tanguay, eds., *Canadian Parties in Transition: Discourse, Organization and Representation* (Scarborough, Ont.: Nelson, 1989), p. 132.

20 This paradox was particularly evident in the late 1950s and early 1960s, during the Conservative regime of John Diefenbaker. His pan-Canadianism led to the national development policy and the extension of hospital insurance, as well as the Royal Commission on Health Services, which resulted in the adoption of national health insurance when the Liberals returned to power (see ibid.).

The paradox became even more apparent during the free trade election of 1988, when Brian Mulroney's Conservatives were compelled to articulate a most un-Conservative commitment to the institutions of Canada's welfare state to show they were not selling out Canadian identity.

21 Keith Banting, "Social Policy in an Open Economy: Neoconservatism and the Canadian State" (paper presented to the annual meeting of the American Political Science Association, San Francisco, August 1990).

22 Keith Banting, *The Welfare State and Canadian Federalism* (Kingston; Montreal: McGill-Queen's University Press, 1982), p. 63.

Thus, fiscal imbalance dictated that local elites in Canada's poorer regions accept a strategy of centralized, national legislation.[23] And despite the costs of interregional transfers, elites and representatives in the industrialized core also found reason to support a national strategy. Their concern, like that of today's Europeans, was that provincially based social programs would lead to interprovincial social dumping. Social programs in the more prosperous core might draw the poor of other regions and drive capital to relocate in provinces where inferior social services also meant lower taxes.[24]

The consequence, as Jane Jenson writes, was that Canada emerged from the war with a system for income security that was centralized but constructed around a "politics of place," rather than a "politics of class."[25] Whereas British reforms were presented as a strategy to break down traditional divisions of class, Canadian reforms were justified as a means of eliminating interregional disparities in benefits. Nation building in Canada meant providing all Canadians with common social rights irrespective of their geographical, not social, place in the national mosaic. Despite sharp regional differences in living standards, Canadians in Newfoundland would receive the same access to health care, education, and social benefits as Canadians in Ontario.

There is a good historical reason, then, for thinking that in the absence of constitutionalized social rights, a more decentralized Canada would flounder as a nation. The pot of glue so important in Canadian nation building would be lost. And faced with a renewed threat of interprovincial social dumping, individual provinces would be unlikely to fill the void or to move quickly to address the problems that are the result of both profound economic and social changes and almost two decades of social policy neglect in Canada.

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23 Unlike the case in the United States, where self-interest dictated a strategy of local control among Southern elites.

24 Banting, *The Welfare State and Canadian Federalism*, p. 64.

25 Jane Jenson, "Representations in Crisis: The Roots of Canada's Permeable Fordism," *Canadian Journal of Political Science* 23 (1990): 653–683.

Some Final Thoughts

Nothing I have said is intended to imply that pursuing a constitutional path toward a social union for Canada would be without difficulties or challenges. Many of these are well known.

First, the use of the courts is now biased in favor of corporations and others with the resources to finance costly legal proceedings. Thus, some mechanism would be required to redress the balance in favor of popular sovereignty in Canada's legal system.

Second, it is likely that several decades of social learning and institution-building would be required to make the constitutional path effective. As Leibfried points out, implementation of a social charter comes more easily to countries such as France or Germany, where a Roman law tradition has resulted in an institutional legacy of intensively court-policed law and a highly juridified conception of social policy.[26] For countries that lack this historical experience, such as Canada, the United States, and the United Kingdom, the constitutional path would be more difficult.

Finally, it is conceivable that rather than providing a springboard to the future, a social charter "made in Canada" would trap the country in the past. Despite the self-congratulatory comparisons Canadians like to draw between their own social policy institutions and those of the United States, Canada has a welfare state that is comparatively weak and underdeveloped by international standards,[27] a reflection of the residualist welfare-state legacy it shares

26 Leibfried, "Europe's Could-Be Social State," p. 16. For example, the very low rate of labor force participation among German males over age 50 is a direct result of rulings by the Federal Social Court allowing for the use of the labor market as well as medical conditions in establishing eligibility for disability pensions. See Klaus Jacobs and Martin Rein, "The Future of Early Retirement: The Federal Republic of Germany," in John Myles and Jill Quadagno, eds., *States, Labor Markets and the Future of Old Age Policy* (Philadelphia: Temple University Press, 1991), pp. 250–267.

27 See Keith Banting, "The Welfare State and Inequality in the 1980s," *Canadian Review of Sociology and Anthropology* 24 (1987): 311–338; and Julia O'Connor, "Welfare Expenditure and Policy Orientation in Canada in Comparative Perspective," *Canadian Review of Sociology and Anthropology* 26 (1989): 127–150.

with the other Anglo-American democracies. In the current political climate, Canadians face the real, though avoidable, risk that any set of constitutionalized social rights would bear the imprint of this residualist legacy, making it more, rather than less, difficult to address the new social problems that confront the country.

Yet perhaps the difficulty in imagining a Canadian social charter that would take the country forward is only a lack of imagination. Since the Anglo-Saxon countries have no history of juridified social rights, Canadians lack the practical experience and analytical tools required to evaluate the constitutional option. But all this lack means is that we shall have to work harder at evaluation. Perhaps the chief merit of the current proposals for a social charter is the challenge and opportunity they provide to get this work under way.

A Social Charter:
Two Cheers but Not Three

John Richards

Lars Osberg and Shelley Phipps advocate introducing a social charter into the constitution on the grounds that "entrenching the rights of individuals to adequate levels of basic necessities means entrenching the social responsibility of the Canadian community to all its members."[1] They are not alone. A social charter, along with the related idea of imposing "national standards" on social services provided by subnational levels of government, has become a key demand of many Canadians, and it has been the central constitutional demand of the Ontario government.

Osberg and Phipps devote the first third of their essay in this volume to summarizing evidence as to why no one should be complacent about income distribution in Canada. I completely agree with them that "two of the most dismal failures of poverty policy have been the continued high incidence of poverty among female-headed, single-parent families and among native Canadians."[2] I also share their concern over the trend to increased polarization of the wage distribution during the past two decades.

After reading these authors' evidence on inequalities in the country, it seems heartless to raise objections to the idea of a social charter. Surely, it would do no harm to entrench the requirement that

I thank Allan Blakeney and John McCallum for their generous editorial comments on an earlier draft of this paper; they bear none of the responsibility for the remaining inadequacies. I also thank my colleague Steven Davis for his contribution to drafting the text of a proposed social charter.

1 Lars Osberg and Shelly Phipps, in this volume.

2 Ibid.

governments provide a minimum level of social services to all, and it might do some good.

Maybe, but maybe not! Before commenting further, I simply plead that we not expect too much from constitutional reform and that we fully admit the uncertain consequences of all proposals. Constitutional analysis is something like the practice of psychiatry. Both are worthy activities — provided they do not absorb too many of a society's resources — but I feel uneasy when practitioners of these crafts minimize the uncertainty that inevitably surrounds their diagnoses and recommendations. In both domains, there is an overabundance of evidence and much uncertainty. Most of us — I make no exception for myself — abhor uncertainty, and we often attempt to impose more intellectual order than is possible. It is relatively easy to choose facts selectively and construct a plausible theory that confirms prior beliefs. Convinced Freudians never find evidence that casts doubt on the Oedipus complex; Pierre Trudeau never finds evidence to suggest that it might be desirable even remotely for Quebec's National Assembly to enjoy additional powers.

This is not a conservative apology for inertia but an insistence that before endorsing *any* constitutional proposal, we assess carefully whether it passes the following double test:

1. Does it symbolically affirm important aspirations held by a large number of Canadians?
2. Does it fit well with other components of our constitutional order? Is it likely to add to or subtract from the productivity of the whole? This second test invokes what Bill Robson describes as the "constrained vision" of politics.[3] Advocates of constitutional reform must address the probable impact of their proposals on the efficiency with which governments utilize tax revenues to generate citizens' desired outcomes.

This paper summarizes my own attempt to apply the above test to proposals for a social charter. In the first part, I give a brief

3 William B.P. Robson, in this volume.

overview of our constitutional division, and of the role of a social charter among the principal conflicting demands (for a distinct society, for a Triple-E Senate, for new powers to strengthen the economic union, and for self-government by Canada's first peoples). In the next part, I assess more specifically the case made by Osberg and Phipps for a social charter. Finally, I offer a proposal for a simple social charter based on amendments to the equalization and regional disparities section (section 36) of the *Constitution Act, 1982*.

Four Shocks and Four Nationalisms

Over the past quarter century, our constitutional framework has suffered four major shocks: the quiet revolution of the Québécois;[4] the social and economic crisis of the native peoples; sharp changes in the regional distribution of income resulting from shifts in world commodity prices; and the huge rise in the public sector deficit. Under any of these shocks singly, the framework would probably have remained intact; together, they have destroyed our constitutional foundations.

Each of these shocks has given rise to a nationalist response. In moderation, nationalism is a constructive affirmation of community, but nationalist dialogues slip with disturbing ease from affirmation of community into blame of outsiders for perceived problems. Any honest assessment of our constitutional debate cannot avoid a painful conclusion: many ordinary Canadians now subscribe to incompatible nationalist doctrines and to simplistic, often intolerant conclusions about those with whom they disagree. Restoring equilibrium will require a larger measure of tolerance than was displayed during the 1980s, a willingness to accept that the discourse of each nationalist community contains kernels of truth and wisdom — and chaff. I believe that it is still desirable to preserve the Canadian federation. If it is to survive, however, Canadians will have to

4 I use "Québécois" throughout the essay to refer to those Quebec residents whose maternal language is French. This is not to imply that Quebecers whose maternal language is other than French are in any way less legitimate citizens of the province.

empower their political leaders to strike a deal without condemning them for "selling out" over the necessary compromises.

The Quiet Revolution

One obvious shock has been the *révolution tranquille*. Central to this complex social renewal was the Québécois' insistence that French become the dominant language of instruction and work within Quebec. The federal government under Lester Pearson and Pierre Trudeau responded by promoting bilingualism within its own jurisdiction and by generously subsidizing francophone interest groups as well as all provincial governments in the provision of minority language services. In exchange, however, the federal Liberals insisted that language policy be treated constitutionally as an extension of individual civil liberties. Trudeau adamantly refused to compromise on Québécois nationalist demands that the Quebec National Assembly enjoy explicit jurisdiction over promotion of the French language.

In a cosmopolitan community whose members engage in extensive communication across linguistic lines, "free trade" in language inevitably leads intergenerationally to the disappearance of minor languages in favor of one dominant language. Having understood this fundamental truth ever since the conquest of 1759, the Québécois majority has been consistently unwilling to allow linguistic free trade. The Quiet Revolution eliminated the leading role of the Catholic Church in protecting *la langue et la foi*, so the Québécois have insisted since the 1960s on a constitutional amendment to assure that the Quebec Assembly exercise effective sovereignty over linguistic policy (subject to minority language rights for Quebec anglophones).

Cultural and Economic Stress among Aboriginal Canadians

The second shock has been the profound crisis of family disintegration, cultural anomie, social distress, and poverty among aboriginal

Canadians as their interactions with white industrial society have intensified. Public policy has been dismally inadequate to the magnitude of the crisis. The result has been increasing militancy among the native peoples and a translation of their demands into a form of nationalism — the demand for "self-government" over native lands and for extended authority to provide services to off-reserve aboriginals. Native leaders may lack consensus in defining self-government, but the desire to exercise a large measure of political autonomy from white administration is deeply felt.

Large Commodity Price Movements

The third shock has been the large, unexpected movements in international commodity prices, of oil in particular, over the past two decades. These price changes generated dramatic regional income redistribution and demands from the losers for offsetting public policy. Optimal federal policy required, simultaneously, respect for the efficiency advantages of provincial resource jurisdiction, exercise of the federal taxing power to redistribute a good deal of windfall rents out of the resource-rich provinces, and reliance on relatively high domestic prices to realize conservation goals. Yet successive federal governments placed excessive emphasis on the goal of regional redistribution. The culmination of this approach was the National Energy Program, introduced in 1980; it imposed low domestic prices and made available massive subsidies to Canadian-owned firms willing to develop inefficient high-cost reserves located outside provincial boundaries. The hostility to this program in Western Canada proved the catalyst for launching a brand of right-wing populist nationalism.

The rational core of this populist nationalism is mistrust of Ottawa's pursuit of inefficient policies designed to redistribute toward marginal voters, particularly in Central Canada, at the expense of productive regional economies, particularly in Western Canada. The response has been adamant insistence on a Triple-E Senate (elected, equal, and effective) able to constrain such inefficiency.

The Public Sector Deficit

The fourth shock has been the rising public sector debt, the result of a quite reasonable public demand for a European-style welfare state combined with a quite unreasonable refusal to pay for it. In the 15 years from 1960 to 1975, Canadian governments dramatically expanded social programs, introducing universal health insurance, expanding postsecondary instruction, and inaugurating a national shared-cost program for social assistance. Expenditures on programs (excluding debt service) by all levels of government increased from roughly 28 to 36 percent of gross domestic product (GDP) during those years. Since 1975, aggregate program expenditures have remained a constant share of GDP.[5] Yet, we Canadians have never reached a social contract among ourselves to determine how to pay for this generous welfare state. The result has been a deficit in aggregate public sector accounts in every year since 1974 and a disturbing rise in the debt/GDP ratio and in debt-service expenditures. Controversy over imposition of the goods and services tax has been only the most dramatic example of the political conflict in the 1980s faced by governments of all ideological stripes as they attempted, unsuccessfully to date, to balance their accounts.

Given this fiscal crisis, interest groups have sought to protect their stake in the welfare state (and to make new advances), and the introduction of the Charter of Rights and Freedoms has given them a new and potentially powerful instrument for doing so. Tom Courchene coined the phrase "charter nationalism" to describe this fourth nationalism.[6] It is a loose coalition of interest groups sharing the tactical goal of expanding the role for the Charter in determining public policy. This coalition has been influential within the Liberals

5 Setting aside countercyclical spending during the 1981–82 recession.

6 Thomas J. Courchene, "Forever Amber," *Reflections* 6 (1990) (Institute of Intergovernmental Relations, Queen's University, Kingston, Ont.); and idem, "The Community of the Canadas," *Reflections* 8 (1991) (Institute of Intergovernmental Relations, Queen's University, Kingston, Ont.).

and, *a fortiori*, within the New Democratic Party (NDP). The demand for a social charter is a logical extension of the charter nationalist agenda.

It is worth noting that, for predictable reasons, this coalition has been highly mistrustful of trade liberalization, fearing it as a constraint on the scale of domestic social programs. Canada has always been a trading nation earning a relatively large portion of its national income from exports. The globalization of Canadian commercial policy — through, for example, the Canada-U.S. Free Trade Agreement, the prospect of a North American agreement including Mexico, and successive rounds of the General Agreement on Tariffs and Trade — has locked the country's policy ever more firmly into acceptance of international free trade. One result has been to strengthen the credibility of business lobbies' threats to shift the location of investment and of consumers' threats to shop cross-border if the tax burden is increased.

The Result

The interactive effects among the shocks and the various nationalist discourses are by now painfully obvious. A majority of Canadians in "the Rest of Canada" (ROC) plus anglophone and allophone Quebecers want the Charter of Rights and Freedoms to prevail over the Quebec National Assembly in determining Quebec's language policy; most Québécois do not. Francophones outside Quebec and allophone ethnic minorities want the Charter to prevail over governments in general in defining minority rights. Populist nationalists advocate an "unhyphenated Canadianism" and are suspicious of the Charter's application to multicultural policy. Québécois nationalists and aboriginal leaders converge in wanting the Charter not to have precedence over their respective "distinct societies"; they vehemently diverge inasmuch as the latter want Ottawa to prevent any autonomous Quebec state from seceding with its present borders,

which include large northern territories populated primarily by aboriginal people.

Populist nationalists favor extension of the Charter to protect private property. They expect a Triple-E Senate to monitor and constrain federal spending; they intensely dislike the idea of a powerful social charter dictating the level of social services and of Ottawa's having access to an unconstrained spending power. Underlying the demand for a Triple-E Senate is the concept that all provinces be treated as constitutional equals, a concept that is anathema to Québécois nationalists but has some appeal to the charter nationalist coalition, which wants to restrain provincial discretion in the area of social policy.

Supporters of a social charter are suspicious of, if not opposed to, an elected Senate for precisely the reason its advocates want it. Social charter advocates also want Ottawa to preserve its powers to spend in areas of provincial jurisdiction, because they want it to be able to launch new nationwide social programs in areas such as child care. Québécois nationalists mistrust an elected Senate, the federal spending power, and a social charter as indirect means whereby Ottawa could intrude on Quebec's legislative jurisdiction.

Finally, the populist nationalists in the West and the business community clearly favor proposals to strengthen the domestic common market within Canada. Both Québécois nationalists and charter nationalists criticize these proposals as constraints on the scope for political intervention.

The Case for a Social Charter, According to Osberg and Phipps

Let us turn now to the case made by Osberg and Phipps for a social charter. They put forward four identifiable arguments. Each is worth examining individually.

Argument 1. A social charter would extrapolate a long-run trend toward expanding the content of citizenship.

Osberg and Phipps note:

> Over time, [the idea of citizenship] has evolved and broadened. Thus, a...major reason for the adoption of an explicit charter of social rights is that it would both express and help to realize an idea of citizenship that is in keeping with the views of Canadians today.[7]

An argument common during the last decade has been that the entrenchment of a broad range of rights would enhance Canadians' shared ideal of citizenship.[8] This idea is traceable to, among others, T.H. Marshall, who conceived the expansion of the British welfare state by the postwar Labour government as a logical extension of the meaning of citizenship.[9] Citizen rights began in European society, Marshall argued, as basic legal rights, such as habeas corpus and freedom of expression. They were extended during the nineteenth and early twentieth centuries to include political rights, such as the democratic right to participate in meaningful elections that determine who governs. They have now come to include social rights that define the modern welfare state, such as unemployment insurance, universal health insurance, and old age security benefits.

This concept of the rights of citizenship being extended over time is an elegant, almost Hegelian, idea about historical change. But is it valid, either as an empirical generalization or as a moral ideal?

Empirically its validity is dubious. We are currently enjoying international euphoria over the demise of the Soviet empire, but the twin scourges of Stalinism and Nazism produced in the twentieth century more widespread disregard for even the most minimum concept of human rights than had occurred in Europe since the

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7 Osberg and Phipps, in this volume.

8 See, for example, A.C. Cairns, "An Overview of the Trudeau Constitutional Proposals," in *Disruptions: Constitutional Struggles from the Charter to Meech Lake*, constitutional essays by A.C. Cairns, edited by D.E. Williams (Toronto: McClelland and Stewart, 1991).

9 T.H. Marshall, *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950).

religious wars of the Renaissance, if not earlier. As an ideal, the concept of the extension of the rights of citizenship is valid in a very general sense: citizen expectations in industrial societies have risen dramatically over the last three centuries. Today's Canadian citizens expect to live under a just legal system; they expect to work in and enjoy the fruits of a productive industrial economy; they expect to pay for, via taxes, and receive the benefits of a mature welfare state.

Yet we should be cautious about introducing a social charter even as the expression of an ideal. There is the potential of confounding means and ends. The social charter is an idea born of an optimistic moment in postwar Europe when social democrats saw few difficulties in reconciling Keynesian demand management of a full-employment, productive economy with greater equity via an expanding welfare state. In the full-blooded version — a justiciable charter, one enabling the courts to rule on the adequacy of state provision of a broad range of goods and social services to the population — it simply ignores what we have learned in the past 40 years about the constraints on the state's ability to substitute for market activity.

Although Osberg and Phipps do address some of the difficulties posed by adoption of a social charter, they do not explicitly pose two basic questions:

> *1. How generous can the welfare state be before the tax costs of paying for it significantly affect the willingness of people to produce wealth in the private economy?*

The persistence of a public sector deficit since 1974 suggests that Canadians have reached the hard-to-define limit on willingness to pay for publicly provided social services. If a social charter were to be presented as a means of forcing governments to increase social policy spending, it would either frustrate its advocates (because it would have no effect and social policy spending would not rise) or prove counterproductive (because increased social spending would aggravate our present problems of loose fiscal policy offset by tight monetary policy).

2. Would a social charter lower the efficiency of provision of publicly provided social services?

In making the case for a social charter, the government of Ontario specifies that it should comprise four basic elements:

- A statement of the values and principles which Canadians wish to affirm and which should guide governments in the realm of social policy;
- Institutions for developing, protecting, negotiating, monitoring, and enforcing policies which give concrete expression to these values and principles;
- A provision for broad public participation to ensure that policies, programs, and services continue to be responsive to public need;
- A recognition that national sharing is required for realizing the social charter's principles across the country.[10]

The fourth element is a restatement of the requirement for interregional transfers that already exists in the *Constitution Act, 1982* (see Part III of the act).

The second and third elements imply that an external institution, such as the courts or another level of government, should enjoy a measure of authority over the government that actually provides a social service — call it the "responsible government." Granting some authority to an external institution would subtract some authority from the responsible government, and such diminution might undermine its willingness to undertake the politically painful task of providing social services in an efficient manner. Whether in the private or public sector, efficiency entails managers' weighing costs and benefits within the context of financial constraints. A social charter could create two sets of masters neither of which could be held accountable for outcomes.

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10 Ontario, Ministry of Intergovernmental Affairs, *A Canadian Social Charter: Making Our Shared Values Stronger* (Toronto, 1991).

A recent example illustrates the problem. In late 1990, the Quebec government stated its intention of imposing a user fee on nonemergency use of hospital emergency wards; the goal was to divert such patients away from a high-cost service toward much less costly community health centres.[11] Such a user fee, however, would violate one of the five national standards imposed on provincial health insurance programs by the *Canada Health Act*, itself a limited social charter, and members of Parliament from all parties called on Ottawa to invoke on Quebec the financial penalties stipulated in that Act. At time of writing (December 1991), the fee has yet to be imposed, but the point is obvious. Providing a measure of authority to an external institution gives a political standing to those interest groups opposed to a decision of the responsible government and reduces the willingness of politicians to take controversial, efficiency-enhancing decisions.

As Cousineau argues, much social policy spending in Canada is not primarily intended to redistribute from rich to poor.[12] Social insurance programs, such as health care insurance and old age security, realize some redistribution, but they are also intended to improve the efficiency of supply of important insurance services relative to the private market alternative. Canadians, like the citizens of most industrial countries other than the United States, have concluded that these activities entail sufficient scale economies to warrant their being considered natural monopolies and that public supply is generally more efficient than private.[13]

Yet even if public supply is potentially more efficient than private, that potential will not be realized unless the responsible

11 *Globe and Mail* (Toronto), December 8, 1990, p. 1.

12 Jean-Michel Cousineau, "Social Security and the Division of Powers in Canada," in a forthcoming volume on the division of spending powers in "The Canada Round" series.

13 The jewel in the crown of Canadian social services is universal health insurance. The Canadian model has proved sufficiently efficient to draw favorable reviews even from the United States government. See United States General Accounting Office, *Canadian Health Insurance Lessons for the United States*, GAO/HRD–91–90 (Washington, D.C., 1991).

government takes the necessary measures to realize it. Many of these measures — diverting patients from very costly hospital emergency wards, limiting the number of physicians in overdoctored metropolitan areas, constraining physicians' use of hospitals, bargaining down the fee schedules and salary levels of care-providers, and so on — are inevitably controversial.

In summary, advocates of a social charter must be careful that in arguing for entrenched social rights, they do not impede the ability of public sector managers to give value for money. In such a situation, a social charter could ultimately lower the willingness of Canadians to pay for the redistribution inherent in many social programs.

Argument 2. A social charter would provide an alternative to political lobbying as means of obtaining services.

As a second argument, Osberg and Phipps suggest:

> A charter...would provide a mechanism of redress for groups... [that] are too small, too socially stigmatized, or too unorganized to influence the political and bureaucratic processes effectively.[14]

If this argument is to be differentiated from the first, it must amount to a case for justiciable social rights in which the "mechanism of redress" enforcing the social charter is the courts. If the mechanism is another level of government, the question immediately arises, if a group is "too small, too socially stigmatized, or too unorganized" to influence the responsible government, why would it have any more success with another government?

The authors are careful not to commit themselves to a full-blooded justiciable charter, but many passages of their essay imply they prefer that option over an "administrative" charter in which monitoring would remain under the authority of elected parliaments and legislatures. I appreciate their distaste for political superficiality

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14 Osberg and Phipps, in this volume.

— "since the political arena is increasingly dominated by the eight-second sound bite and the 30-second television commercial, one has to face the fact that it is not well suited to the task of evaluating complex arguments."[15] Yet their critique of glib politicians is itself glib; our politicians have done more than perfect the art of sound bites. Do Osberg and Phipps really prefer the U.S. tradition of court-directed social policy over our tradition of public sector administration by (admittedly far from perfect) elected politicians?

Those favoring entrenched legal rights usually advance a negative theory of human liberty, of liberty as rights that protect individuals from coercion by others, whether acting individually or collectively via the state. An entrenched charter, runs the argument, renders rights more visible and thus gives enhanced political legitimacy to the courts in the ongoing task of constraining the state to leave people alone. This rationale is appropriate for justiciable legal and democratic rights; it does not work so well when the proposed rights involve the state's positive intervention — to redistribute income, for example, or to undertake massive social insurance programs. To be efficient, positive state intervention requires that governments enjoy a degree of freedom in designing and implementing programs analogous to that required by private firms in the market.

Every society must draw a line between justiciable rights and the ability of people to engage in collective political activity. Wherever the line is drawn, there will inevitably arise instances in which we would prefer it to fall elsewhere. This line does not merely impose a tradeoff between equity and efficiency. Extending judicial review may subtract from both.

Take the recent example of British Columbia's attempt to contain the cost of physicians in overdoctored Vancouver. The government set a limit on the number of billing numbers in the metropolitan region. (Without a billing number, a physician could not receive payment from the provincial medical services plan and so was effectively barred from practising medicine.) Physicians in British

15 Ibid.

Columbia successfully argued before the provincial Court of Appeal that the policy was a violation of both mobility and legal rights guaranteed by the Charter of Rights and Freedom. The policy of limiting billing numbers was a less-than-ideal means of controlling medical costs, but the immediate effect of its elimination by judicial review was to increase the aggregate income of Vancouver physicians. The moral of this tale is to suggest not limits on justiciable rights under the existing Charter but the impossibility of drawing a line that guarantees Charter decisions will enhance either equity or efficiency.

A classic example of the perverse consequences of extension of judicial review is the fate of the 14th amendment to the U.S. constitution, whose first section extended the right to private property — "nor shall any State deprive any person of life, liberty, or property, without due process of law." It was introduced in the wake of the Civil War as an attempt to provide guarantees for freed slaves against the actions of the former Confederate states. By the end of the century, however, the courts were interpreting property rights in a manner that restricted legislative regulation of the economy on behalf of the public. In 1898, for example, the U.S. Supreme Court invoked this amendment to declare void a Nebraska statute regulating intrastate freight rates, arguing that the low regulated rates amounted to a deprivation of property without due process of law.[16]

In summary, I conclude the actual Charter of Rights and Freedoms has extended justiciable rights about as far as is practicable — and, with respect to language, has gone too far. Any new social charter should not be justiciable.

Argument 3. A social charter would prevent any potential devolution of administration of social services from creating significantly different social policies across provinces.

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16 See A.H. Kelly and W.A. Harbison, *The American Constitution: Its Origins and Development*, 4th ed. (New York: W.W. Norton, 1948). The fate of the 14th amendment is a cautionary tale for those who believe the federal government's proposal to amend the Charter of Rights and Freedoms to guarantee property rights would be of primary benefit to the ordinary Canadian.

Osberg and Phipps claim:

> If...there is substantial devolution to the provinces of administrative responsibility for social policy and labor market development programs, people will slip through [the cracks] at different rates, in different places because each province will have its own particular system evolving at its own pace....The inequities such a system would produce would be undesirable in themselves. They would also carry political implications. If actual outcomes differ substantially across provinces, at what point does the idea of a common citizenship begin to erode irreparably?[17]

This argument implies a particularly ungenerous reading of the effect of provincial jurisdiction on Canada's social programs. I argue more or less the opposite.

The *British North America Act* contained many overriding powers that would have allowed Ottawa, had public opinion so directed, to impose national standards on provincial activities. During the 80 years following Confederation, constitutional interpretation by the Judicial Committee of the Privy Council greatly strengthened provincial jurisdiction, over social policy among other matters. This constitutional devolution has generally encouraged a beneficial competitive process to improve Canada's set of social programs. Decentralization has not, as Osberg and Phipps fear, resulted in vicious cycles of competition to lower standards.

The paradigm example is the evolution of the Canadian model of health insurance, a program that probably would not be as comprehensive as it is if provinces had lacked jurisdiction over social programs. It began as controversial innovations of the Saskatchewan government under the NDP — and its predecessor, the Co-operative Commonwealth Federation. The province introduced Canada's first universal hospital insurance plan in 1947 and extended it to include medical services in 1962. Although the NDP deserves credit as the

17 Osberg and Phipps, in this volume.

initiator of medicare, what I am saying here is not a partisan comment on that party's virtues; indeed, two other parties played a significant role in enabling the program to extend across the country. John Diefenbaker's Conservative government introduced a form of national hospital insurance and also appointed the royal commission, chaired by Justice Emmett Hall, that proposed national adoption of the Saskatchewan model. And the popularity of the Saskatchewan program prompted Lester Pearson's Liberal government to accept Justice Hall's recommendations and use the federal spending power to induce compliance from reluctant provinces. In brief, the basic guarantee of the quality of social programs lies in the willingness of Canadians, in their capacity as both provincial and federal citizens, to vote for politicians who will provide respectable services and a reasonable level of income redistribution.

Argument 4. A social charter can act as a quid pro quo *for constitutional changes that enhance mobility of goods, services, capital, and labour within the Canadian common market.*

Osberg and Phipps' final argument is:

> [P]rivate market transactions are increasingly unable to meet the economic needs of many Canadians....[T]he Constitution should provide protection of the free market only on condition that effective guarantees for social and economic rights are received in return.[18]

I sympathize with the implications of this argument, although I have reservations about its logic. The authors perceive social programs and intergovernmental transfers as compensation to the poor, whose interests are basically in conflict with those of participants in the market. They conclude, for example, that "intergovernmental transfers to the Atlantic and Prairie provinces were, in large part, com-

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18 Ibid.

pensation for protected markets enjoyed by Ontario and Quebec manufacturers."[19]

Instead of this emphasis on conflict, I prefer Robert Cairns' image of a "necessary tension" between the market and collective political processes.[20] In order to function efficiently, the market requires an effective government able to intervene and correct fundamental market failures; in order to generate sufficient wealth to pay for a generous welfare state, government requires a well-functioning market economy. Thus, the state and the market are potentially complements, not substitutes. Surely, intergovernmental transfers to the peripheral regions should not be perceived in perpetuity as compensation for allowing the growth of the Central Canadian market economy. Historically, there is some truth to the idea that protectionism penalized the nonindustrial regions, particularly during the international depression of the 1930s. But the high tariffs of John A. Macdonald's National Policy cannot forever be adduced as justification for regional transfers. Such an argument ignores secular shifts in the comparative advantage of the various regional economies and the need for labor and capital to be able to move away from regions that can no longer generate reasonable per capita incomes from market activities.

One of the principal reasons that "private market transactions are increasingly unable to meet the economic needs of many Canadians" is that some major social policies intended to help people participate in the market do just the opposite. For too many Canadians, particularly in Atlantic Canada, unemployment insurance has become a permanent substitute for market activity. As many reports and royal commissions have argued over the last two decades, Canadian governments devote too large a share of their labor market expenditures to untied income transfers for the unemployed and not enough to training and mobility. The need for better labor market

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19 Ibid.

20 R.D. Cairns, "On a Necessary Tension of a Democratic Society," in J. Richards, R.D. Cairns, and L.R. Pratt, eds., *Social Democracy without Illusions: Renewal of the Canadian Left* (Toronto: McClelland and Stewart, 1991).

programs is at least as important as any affirmation of the Canadian economic union.

Thus, although my reasons differ somewhat from those of Osberg and Phipps, I agree with them in opposing constitutional measures to enhance private market activity that do not simultaneously address governments' potential to enhance the functioning of labor markets and to improve the equity of outcomes from trade liberalization.

The constitutional reform posed by Ottawa includes a substantial proposal to strengthen the negative integration clause (section 121). It would constrain governments to respect the principle that "Canada is an economic union within which persons, goods, services and capital may move freely without barriers or restrictions based on provincial or territorial boundaries."[21] It also proposes a sweeping positive integration clause (section 91A) that, subject to a mechanism for provincial veto, "the Parliament of Canada may exclusively make laws in relation to any matter that it declares to be for the efficient functioning of the economic union."[22] These proposals reflect modern, conventional wisdom among economists that removal of trade barriers within Canada would increase Canadians' net productivity and incomes. That is doubtless true, but no such sweeping commitments should be enacted without a companion commitment to manage social policy in a manner that addresses the heightened unemployment risk of removal of trade barriers.[23]

Ottawa's proposals pay no attention to the fact that the net productivity gains of removing trade barriers would be distributed unequally. There would be winners and losers. Those who stand to lose would, quite reasonably, oppose the changes. The most important category of potential losers are workers with industry-specific

21 Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services Canada 1991), p. 55.

22 Ibid., p. 56.

23 This essay is not intended to assess the federal proposals for reform. But they to should be subjected to the double test proposed for the social charter. I conclud that the revised section 121 passes both tests but section 91A passes neither.

skills — "human capital," to use the economic jargon — that would be devalued by removal of trade barriers. Policies to retrain workers and lower the costs of mobility should be part of the Canadian social contract to share the benefits from an enhanced common market. As Osberg and Phipps argue, those who are convinced of the productivity gains from removal of government barriers to free trade should have the courage of their convictions and agree to guarantees.

The most important such guarantee, I suggest, would be to manage labor market policies with the goal of realizing lower unemployment. As conservative a journal as *The Economist* recently castigated Western governments for failing to adopt the Swedish model of active labor market policies, policies it described as "the most successful in Europe."[24] If Sweden can achieve an unemployment rate of 3.5 percent (as of December 1991), Canada can surely do far better than its performance of the last decade.

A Modest Proposal for a Social Charter

I return to the double test proposed in the introduction. First, would a social charter symbolically reflect important aspirations held by a large number of Canadians? Yes, it would. Most Canadians, across the various nationalist dialogues, want to preserve and improve the quality of social programs, and a social charter could provide a valuable symbolic affirmation of this shared goal.

Second, would a social charter fit well with the other components of our constitutional order? The answer here must be qualified. A justiciable charter or even an administrative one providing for significant intervention by one level of government into the jurisdiction of another would not fit. Such a social charter would almost certainly exacerbate constitutional conflicts and would likely subtract from the efficiency of public service delivery. If a social charter avoids such difficulties, however, it could indeed fit into the Cana-

24 "The Cursed Dole," *The Economist*, September 28, 1991, pp. 16–17.

dian constitutional order. Beyond symbolically affirming goals, it could provide effective monitoring, which is a valuable way of improving public policies: publicizing the good and condemning the bad.

Who should provide such monitoring? Consider that the basic rationale for an elected Senate is to give senators legitimacy in their task of monitoring the performance of the central government. Inasmuch as the preservation and promotion of social programs is an important constitutional goal, it would be appropriate that elected senators also monitor provincial governments in the performance of this task, especially during the 1990s as we grapple with accumulated public sector deficits. A related monitoring role could usefully be performed on the quality of environmental policy, both federal and provincial environmental policy.

Accordingly, I propose a simple social charter using the following imperatives:

- Balance the federal proposals to enhance the economic union with constitutional recognition of the potential of good labor market policies to lower unemployment.
- Avoid specifying the content of social programs because doing so would inevitably have unintended consequences, confound means and ends, and retard beneficial intergovernmental competition.
- Avoid justiciation of social programs.
- Provide a means whereby Canadians, via a reformed Senate, can on a regular basis monitor the quality of social and environmental policy.

Such a charter could easily be based on amendments to Part III (Equalization and Regional Disparities) of the *Constitution Act, 1982*. It currently reads:

Commitment to promote equal opportunities

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

My proposal for a social charter would require addition of the following subsections:

36 (1)(d) managing public services to support the retraining and mobility of workers whose employment is endangered by

(i) changes in market conditions, or

(ii) the implementation of laws or practices, of the Parliament or Government of Canada or the legislatures or governments of the provinces, where the intent of such laws or practices is promotion of the Canadian economic union by the elimination of domestic or international trade barriers;

(e) furthering the objective of sustainable development in recognition of the importance of the land, the air and the water and our responsibility to preserve and protect the environment for future generations.

(3)(a) The Senate shall report annually to the Parliament and to the legislatures of the provinces on the quality of essential public services and environmental policies provided by the Government of Canada and by the provincial governments.

(b) In preparation of the annual report required by section (3)(a), the Senate shall conduct public hearings in Ottawa and in each province and northern territory, and invite interested Canadians to testify.

Conclusion

A comprehensive social charter has become the principal demand of one of the four nationalist constituencies into which the country has fractured. Restoring a constitutional equilibrium requires accommodation of all constitutional demands — neither the total victory nor defeat of any one proposal. A modest social charter empowering the Senate — an elected Senate, one hopes — to monitor provincial social and environmental programs could be part of the solution.

Examining the Case for a Social Charter: A Constrained Comment

William B.P. Robson

Supporters often herald innovations in public policy with extensive claims about the good effects that will flow from them. The proposals for entrenchment of a social charter in the Constitution made by Lars Osberg and Shelley Phipps, Havi Echenberg and Arthur Milner, and John Myles in this volume, and by the Ontario government in its recent discussion paper[1] are no exception. How reliable are these claims?

This comment critically assesses some key elements of the arguments put forward by social charter proponents. Its principal focus is on the sort of "rigid" charter that would give the courts substantial powers to enforce newly created rights to social programs such as today's medicare — that is, programs characterized by public sector monopoly, unconditional coverage, and minimal or zero user cost.[2]

1 Ontario, Ministry of Intergovernmental Affairs, *A Canadian Social Charter: Making Our Shared Values Stronger* (Toronto, 1991).

2 The judiciable charter conferring rights to such programs can be seen as a rigid version of a social charter, but it is by no means a straw man. Echenberg and Milner argue for a judiciable charter, as does Myles (albeit implicitly). Osberg and Phipps do not argue for a fully judiciable charter, but the medicare model is central to their concept and they make clear their preference for a judicial or quasi-judicial mechanism of enforcement. The Ontario paper speaks of a central enforcement role for the courts and mentions the *Canada Health Act* as a potential model for the standards to be enshrined in a social charter (ibid., pp. 17–19).

I argue that a social charter along these lines is undesirable. The case for it appears to rest largely on distrust of such pervasive features of economic and political life as competition and diversity, complemented by a high degree of trust in the state. Moreover, the solution is fundamentally undemocratic — it would accord powers to judicial bodies that are accountable neither to those who must foot the bill for their decisions nor to voters generally, and it would carve in constitutional stone a set of policies that ought to be subject to legislative review and amendment.

These criticisms apply less forcefully to proposals for a charter and associated machinery designed to exert pressure on elected authorities to meet defined minimum standards. Yet even such a "flexible" charter would need to be designed carefully to ensure that it facilitated, rather than frustrated, adjustment and permitted Canadians in different parts of the country to meet social problems in distinctive ways. And care would have to be taken to ensure that politicians, not courts, were accountable for the design of social programs and their fiscal consequences and were able to respond to voters' demands for change.

A theme running through many comments on a social charter is the age-old conflict between two fundamentally different notions of people and society: the "unconstrained" and the "constrained" visions, to adopt Thomas Sowell's terminology.[3] Throughout history, these radically different perceptions have lain, often unnoticed and unacknowledged, at the heart of the fiercest political debates, as they do today. Although a short summary cannot do justice to all facets, the basic distinction can be briefly sketched.[4]

Holders of unconstrained visions of the world tend to view humans and their works as open to radical improvement — sometimes even to perfection. They are predisposed to look for definitive solutions to social problems and are generally impatient with insti-

3 Thomas Sowell, *A Conflict of Visions: Ideological Origins of Political Struggles* (New York: William Morrow, 1987).

4 A seminal exposition on this subject is Karl Popper, *The Open Society and Its Enemies*, 5th ed. (Princeton, N.J.: Princeton University Press, 1966).

tutions and practices that stand in the way of progress. This tradition — which in past centuries found expression in the works of Jean-Jacques Rousseau, Thomas Paine, and most socialists, and today has exponents in political theory, economics, and legal theory — is prominent in the thinking of social charter advocates, including the contributors to this volume.

Constrained thinkers, on the other hand, are suspicious of claims of radical improvement and doubt the possibility of perfection. They tend to see social policies in terms of tradeoffs and generally value existing institutions for their role in steering human energy into productive channels while mitigating the impact of immutable human flaws. This tradition, exemplified in the works of Adam Smith and Edmund Burke, also finds abundant expression in modern political, economic, and legal theory. Those who take a skeptical view of the social charter proposal, such as myself and apparently John Richards, who appears elsewhere in this volume, tend to be in this camp.

One final introductory comment is in order. A prominent theme in the essays in this volume is the speed of economic and social change. Yet the social charter proposals themselves have a reactionary aspect: they attempt to ensure that, regardless of economic circumstances and Canadians' preferences, tomorrow's social programs will be cast in yesterday's mold. Such a nostalgic approach might conceivably be justified on the basis of the need for consensus, which is also a prominent theme in the writings of social charter advocates. But in a rapidly changing world, it is likely to fail even this test.

I believe that, rather than engaging in a potentially divisive attempt to provide the welfare state of the past with constitutional armor against economic and political pressures, Canadians should preserve as much flexibility as possible for dealing with the social challenges of the future. A political system that regularly presents citizens with a tally of both the costs and benefits of government programs and adapts in the face of change seems the best guarantee of Canadians' well-being in the decades ahead.

Economic Growth, Government Spending, Taxes, and Deficits

> *Marx was wrong in his diagnosis of the manner in which capitalist society would break down; he was not wrong in the prediction that it would break down eventually. The Stagnationists are wrong in their diagnosis of the reasons why the capitalist process should stagnate; they may still turn out to be right in their prognosis that it will stagnate with sufficient help from the public sector.*
>
> — Joseph Schumpeter[5]

It seems appropriate to begin by addressing a common misperception about recent trends in the size of Canadian government. The advocates of a social charter in this volume note that Canada's economic performance has been disappointing over the past 20 years. They also note that, particularly during the 1980s, both government and mainstream economists have shifted toward a more skeptical view of the merits of large-scale government intervention in the economy. This juxtaposition of two facts leaves the impression that during the past decade, when average growth rates were particularly disappointing, Canada's public sector was significantly trimmed in size and influence. Indeed, this supposed retrenchment constitutes a major element in the case for a social charter put forward by Osberg and Phipps, Echenberg and Milner, and Myles.[6]

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5 Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (1950; reprint, New York: Harper Torchbooks, 1975), pp. 424–25.

6 Most of the comments on the presumed retrenchment of Canada's public sector are fairly sweeping, but there are also specific exaggerations. For example, Osberg and Phipps cite recent changes to federal Established Programs Financing (EPF) and Canada Assistance Plan (CAP) transfers as evidence that "the social policy framework can be *substantially* altered by unilateral federal action" [emphasis added]. In fact, in fiscal year 1990/91, those EPF changes amounted to less than 2 percent of provincial spending on health and postsecondary education and the money not paid because of the CAP restrictions totaled barely more than 1 percent of general welfare assistance in the provinces affected. In reality, the only result of these changes has been a rather minor shift in present and future tax burdens from federal to provincial taxpayers — who are, of course, by and large the same people.

Despite the rhetoric of the 1980s, however, the Canadian public sector's direct command over resources and its role in redistributing income have continued to expand; they now stand at their highest level ever. A review of government revenue and expenditure as a proportion of gross domestic product (GDP) reveals a fairly steady expansion of government involvement in the economy over the past four decades, from less than 25 percent in the mid-1950s to 41 percent in the 1980s and almost 45 percent at present.[7] At the same time, retreats on some regulatory fronts, such as energy and transportation, have been matched by advances on others, such as the environment and key aspects of labor markets. (I pass no judgment on the merits of individual examples. The point is simply that the scope of government regulation remains considerable and is probably increasing.)

The Economic Costs of Large Government

The fact that the declining growth of real income per Canadian has taken place against a backdrop of consistent expansion of the public sector is not a minor debating point. It ought, I think, to shift the burden of proof further onto those who associate large government with prosperity. Richards asks rhetorically how generous a welfare state has to become before private wealth generation collapses under its weight; one might respond that, rather than collapse, what we are

7 The numerators of these proportions are averages of government revenue and expenditure calculated on a national income accounts basis. This sort of index of the size of government is open to a number of criticisms. Tax expenditures, for example, are omitted, as are various budgetary transactions, particularly those giving rise to unfunded or unrecorded obligations. More fundamentally, such an index covers only a subset of government activities and may miss important regulatory changes. Despite these problems, however, it is an index resorted to time and again, since other interesting measures, such as state employment or volume of regulation, are either not compiled or do not lend themselves to comparison with a scaling variable, such as GDP.

seeing bears no small resemblance to the slow strangulation predicted more than 40 years ago by Schumpeter.[8]

Many analysts expect large government to impede economic growth for numerous reasons: relatively inefficient use of resources in the public sector; distortions of private choices arising from government transfer payments, regulations, and purchasing practices; and the pervasive distortions, not to mention the administrative and compliance costs, imposed by high levels of taxation. Those conscious of these costs may interpret differently some of the evidence of a failing market economy cited by charter advocates. For example, an obvious explanation for the convergence of poverty rates of families with employed and families with nonemployed heads cited by Osberg and Phipps is increasingly generous income support for the jobless combined with a rising burden of taxation on the employed.

One can also approach the point from the other side. The critical role of government support in maintaining the prosperity of disadvantaged people and regions is called into question by the recent performance of Atlantic Canada, where growth of output and employment consistently outpaced that of the rest of the country during the second half of the 1980s, despite a marked decline in the importance of federal transfer payments in regional income during the period.[9] For Canada as a whole, there is no empirical basis for a judgment that a decline in government's role in the economy has played any part in lowering the average rate of economic growth.

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8 The correlation between expansion of government and slowing of growth can be seen in other countries as well. It is also evident in cross-country comparisons. The countries of the Organisation for Economic Co-operation and Development (OECD) with larger ratios of government revenue and expenditure to output during the 1970s and 1980s tended to have lower growth rates. This relationship emerges more strikingly if size of government during the 1970s is compared with growth during the 1980s, suggesting that, inasmuch as there is a cause and effect relationship, large government's deleterious effects on growth take time to emerge.

9 From 1985 to 1989, federal transfers to the Atlantic provinces, as a proportion of their combined GDP, fell by almost a fifth. During those years, output and employment growth in the region outpaced those in the rest of the country by 3.0 and 1.3 percentage points respectively.

The Pressure of Large Deficits on Living Standards

The chronic persistence of deficit financing by Canadian governments over the past decade suggests that public sector expenditure exceeds the level that the electorate is willing to finance. This development, which raises questions about the extent of popular support for large government, has had serious consequences. A persuasive case can be made that one of the principal reasons for deteriorating income growth in recent years has been the adverse effect of government deficits on capital investment and foreign indebtedness.

From 1980 to the third quarter of 1991, Canadian governments have run deficits on current transactions (excluding the Canada and Quebec Pension Plans) — that is, *before* accounting for capital investment and depreciation — amounting to almost $240 billion. Even if as much as half that amount was offset by increased saving in the private sector, the cumulative damage to Canada's combined capital formation and net foreign investment amounted to nearly $120 billion — a tremendous loss of wealth, equal to two-thirds of Canada's total net investment in housing during that time. The burden of foreign borrowing alone is illustrated by the tripling of Canada's net outflow of investment income during the decade. If foreign debt service had stayed at its 1980 level, Canadians in 1991 would have had over $16 billion more — $2,500 per family of four — in return for their productive efforts.

In fact, interest payments on the public debt have risen more than twice as fast as other elements of government expenditure over the last decade. Given Canadians' growing resistance to tax increases, interest payments are the single most important source of stress on social programs in Canada today.[10] There is nothing in the

10 Thus the "short-sighted political expedience" cited in the Ontario social charter proposal as a major threat to Canadian social programs (Ontario, Ministry of Intergovernmental Affairs, p. 3) seems to be most applicable in the sense that short-sighted expedience has led governments year by year to make expenditures that they were not willing to finance with taxes.

social charter proposals, which focus exclusively on forcing governments to provide more services without consideration of their financing, to suggest that a charter would do anything but exacerbate this problem. The end result would be lower, not higher, living standards and less, not more, job security.

Protecting (the Growth of) the Welfare State from Voters

You charter your rights,
I'll charter my rights;
If my rights meet your rights
And get into fistfights,
You don't wanna budge?
Well, here come the judge.

— Susan Kastner[11]

Removal of Democratic Accountability

Along with chronic deficits, the strong public reaction against the goods and services tax (GST) and the recent popularity of cross-border shopping are strongly suggestive of a population increasingly restive under a growing tax burden. Much of the impetus for a social charter seems to arise from concern that future electorates may be less supportive of generous social programs than those of the past and that a constitutional stick will be needed to force governments to make decisions unpopular with voters.

The central notion here is an undemocratic one: that some agency — the courts or another adjudicating body — should be empowered to protect and expand transfer payments and state-provided goods and services that the electorate will not vote for. Inherent in this proposal are potentially profound and disagreeable consequences. Echenberg and Milner's assertion that "both the Ca-

11 Susan Kastner, *Toronto Star*, July 22, 1989, quoted in William D. Gairdner, *The Trouble with Canada: A Citizen Speaks Out* (Toronto: Stoddart, 1990), p. 435.

nadian and the U.S. Supreme Courts have been reluctant to interfere with the power of legislatures" is not reassuring. Neither Canada nor the United States has a judiciable social charter at present, and even without one, both countries have generated some remarkable judicial activism.

Why entrust unelected authorities with yet more political power? At this point, it is tempting to turn Osberg and Phipps back on their own arguments, and ask social charter advocates to have the courage of *their* convictions. If, for example, the unemployment insurance (UI) program is and always will be overwhelmingly popular in its current form, no government will dare tamper with it in any substantive way, so it needs no charter protection. If, on the other hand, a future electorate might possibly turn to a government committed to reforming the system, one might ask what business today's government has eliminating that choice.

In areas of provincial responsibility, one might similarly ask what business voters in one province have enforcing their preferences on voters in another. This desire for central hegemony in social programs, which appears to be inspired by an exaggerated fear of "leveling down" (more on this phenomenon later), is fundamentally incompatible with provincial jurisdiction over social programs.

Negative versus Positive Rights

> *The modern democratic state has needs that are threatened by a fragmented politics of interest-group accommodation. The scope of contemporary government provides multiple opportunities for special interests to exploit their privileged access to government at the expense of the larger public. These opportunities are enhanced to the extent that access is in private arenas which pay little attention to the trade-offs involved.*
>
> — Macdonald Commission[12]

12 Canada, Royal Commission on the Economic Union and Development Prospects for Canada [Macdonald Commission], *Report* (Ottawa: Supply and Services Canada, 1985), p. 69.

Advocates of a social charter may respond, in line with the logic that a social charter is a natural extension of the notion of citizenship rights, that "positive" rights to government transfers and state-provided goods and services should be protected from the tyranny of the majority, just as "negative" legal and political rights are.

One objection that can be raised to this analogy is that if a negative right, such as freedom of speech, is lost, it is less likely to be recovered without civil strife than a lost positive right, such as the right to a particular kind of benefit. In any event, if the concern is — as it probably should be — with possible deprivation of politically unpopular groups of a given social program, the legal and political rights already accorded Canadian citizens, particularly through the Charter of Rights and Freedoms, make it difficult for governments to discriminate in providing benefits. Indeed, this protection is the reason for the "Charter-proofing" referred to by Echenberg and Milner.

More fundamentally, however, civil or negative rights differ from social or positive rights in a way not sufficiently stressed by social charter advocates. Rights such as *habeas corpus*, and freedom of speech, association, and religion are bulwarks against the state's taking something away from the individual. Rights to food, shelter, and so on, on the other hand, are rights to enjoy the fruits of redistribution: by definition, they *require* the state to take something away from somebody else.[13] That being the case, it is critical for those whose property, incomes, or jobs are to be sacrificed to be represented in the process. The principle that governments ought to be democratically accountable for taxation lies at the root of parliamentary government, both historically and in current practice — appropriation

13 This commitment to "take away" assumes greater significance in the context of a social charter intended not simply to maintain, but to extend, the welfare state. And extension is the explicit aim of charter advocates. Thus, Osberg and Phipps say, "A social charter could help to...*expand* the right of the homeless to some form of shelter" [emphasis added]; Myles states "To go forward, Canadians require more protection against markets, not less. They do not get enough from the welfare state programs and other legislation that came to maturity in postwar Canada to protect people against markets"; and the Ontario proposal argues that "The purpose of the social charter is not only to maintain the present network of social programs, but also to contribute to its growth" (Ontario, Ministry of Intergovernmental Affairs, p. 21).

bills are always motions of confidence. By putting the power to confiscate or to require confiscation in the hands of unelected bodies, a judiciable social charter would undermine this key principle.[14]

Entrenching property rights in the Constitution along with a social charter appears a neat way to balance this concern. But by instructing the courts to redistribute and not to redistribute at the same time, this solution would give even greater latitude to the inclinations of individual judges, risking the principle of the rule of law along with that of accountability for taxation.

Protecting the Welfare State from Competitive Pressures

One of the starkest manifestations of Canada's declining growth of output per capita is its contrast with the faster productivity growth

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14 Again, it is not enough to assert that courts will not usurp the function of legislatures. Many observers contend that recent trends in legal theory and jurisprudence are leading the courts in that direction even in the absence of a social charter. A strongly worded expression of this view can be found in F.L. Morton and Rainer Knopff, "The Supreme Court as the Vanguard of the Intelligentsia: The Charter Movement as Postmaterialist Politics," Occasional Papers Series, Research Study 8.1 (Faculty of Social Sciences, University of Calgary, January 1992).

A recent case — *Schacter v. Canada*, (1990) 66 D.L.R. (4th) 635 (F.C.A.) — raises this issue in stark terms. In early 1990, a federal court of appeal upheld a trial court decision that found that *Unemployment Insurance Act* provisions for benefits to adoptive, but not natural, parents violate the Charter of Rights and Freedoms, and it ordered benefits to be paid to natural parents as well. The trial judge had explicitly considered and rejected the option of finding the law inconsistent with the Charter, with the proviso that it remain in force for a period of time sufficient to allow amendment to the legislation. Addressing the questions of whether the courts had the power to amend legislation and the power to appropriate public funds for a purpose not authorized by Parliament, Heald J., writing for the majority, argued that the Charter conferred both powers. (Mahoney J., in a dissenting opinion, argued that the exclusive authority of Parliament to authorize the disbursement of public funds was a fundamental principle of Canada's Constitution, with roots more than three centuries old.) The federal government has appealed this judgment to the Supreme Court, supported by briefs from several provinces — including Ontario. Although the Supreme Court may not uphold the judgment, the progress of the case so far sheds considerable light on the extent to which a social charter worded like the Charter of Rights and Freedoms might transfer responsibility for government spending programs from legislatures to the courts.

of some of Canada's trading partners. To a producer of tradable goods or services, relatively sluggish productivity growth translates into a crisis of competitiveness. Not surprisingly, for every social advocate who expresses concern over the retrenchment of the welfare state, there is a business advocate who blames the growing weight of government for his or her difficulties in the face of intensifying competition from foreign firms that enjoy some combination of lower taxes, less restrictive regulations, and more efficient provision of public goods and services.

The growing focus on competitiveness of recent years is a major concern of social charter advocates, since it raises the specter of "leveling down." Thus, Ontario states that "entrenchment is...a strategy for ensuring that growing interprovincial and international economic competitive pressures do not become an excuse for weakening or abandoning our social contract,"[15] and Echenberg and Milner argue that a charter would be useful as a tool in international negotiations "so that social and environmental standards are not gutted as domestic economies become globalized."

One must first ask whether history supports this view — after all, interprovincial and international trade are not novelties of the 1990s. Here, I must weigh in enthusiastically with Richards: it does not. Throughout the postwar period, the scale and scope of the welfare state has been steadily expanded, in imperfectly coordinated fashion, in all Canadian provinces and, in almost completely uncoordinated fashion, in all developed countries. Richards cites the "paradigm example" of Saskatchewan's introduction of universal hospital insurance. One also thinks of Ontario's raising per capita transfer payments to persons by 10 percent annually during the 1980s, despite a competitive position severely deteriorating both domestically and internationally during the second half of the decade.[16]

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15 Ontario, Ministry of Intergovernmental Affairs, p. 3.

16 Data on per capita expenditures are from Irene K. Ip, *Big Spenders: A Survey of Provincial Government Finances in Canada* (Toronto: C.D. Howe Institute, 1991), table A.4. The impact of rising domestic costs and, after 1986, an appreciating exchange rate on Ontario's competitiveness *vis-à-vis* the United States is well...

Over the postwar period, as barriers have been reduced, world trade in goods and services and global capital flows have grown much faster than world output. Yet these have been the years when the welfare state in the developed world has grown to its current impressive size. Countries with vastly disparate living standards and social programs continually trade with each other, as they always have. There is not much evidence that open borders have gutted social programs. Indeed, most economists would argue that trade between provinces and countries has been a powerful social program in its own right, producing income gains that have made social support for some parts of society less necessary and social support for all parts of society more affordable.

The "competitiveness issue" also illustrates a frustrating aspect of the popular discussion of Canada's deteriorating economic performance: a focus not on *absolute* declines in growth of productivity and living standards — which ought to be the key issue — but on declines *relative* to individual trading partners in individual commodities. From an economic perspective, this view of competitiveness is deficient. It ignores the fact that, regardless of absolute levels of productivity and living standards, Canada will always have trade deficits (and surpluses) in specific commodities with specific countries. Comparative advantage and the fact that the balance of payments must balance will see to that. The key issue affecting Canadians' living standards is not government policy's implications for competitiveness in a given sector but its implications for productivity and incomes economy-wide.

This same misplaced focus affects arguments about a social charter. Advocates express little concern about the possible adverse

Note 16 - cont'd.

...known. Less noted is the fact that Ontario's relative cost performance within Canada has also been poor; an index of provincial expenditure deflators weighted by 1984 interprovincial trade shows a deterioration of the province's domestic position of about 5.5 percent between 1982 and 1989. Price and cost pressures related to persistent rapid increases in provincial government expenditure no doubt contributed to this deterioration. Not surprisingly, national standards, which would presumably encourage other provinces to "level up" to Ontario's standard, are a prominent focus of the Ontario paper.

impact of a large public sector on living standards. What does concern them is that competitive pressure arising from faster productivity growth in jurisdictions with smaller or more efficient public sectors will produce pressure for reform in jurisdictions with bigger or less efficient ones.

To repeat, however, the most important factor determining living standards is not productivity abroad but productivity at home. If competition from other provinces or from abroad is what is needed to make Canadians address defects in their own national or provincial social policies, that is surely to the good. Individual provinces, like Canada as a whole, have frequently borrowed from outside in developing the welfare state. A social charter that cut one province or the country off from adopting, for example, more efficient forms of health-care delivery or novel ways of financing education would inflict needless damage.

Protecting the Welfare State from Diversity

> *Parliamentary government combined with federation give the citizens of a country a more effective set of institutions for reflecting their will, preferences and aspirations. Responsible government is democratic government; but responsible government plus federalism is extended democracy, simply because there is more competition.*
>
> — Albert Breton[17]

Fear of leveling down, along with the notion that the state can bind Canadians together in a way that mutual affection cannot, is at the heart of the view that diversity is a threat to the welfare state. National standards are prominent in Myles' paper and central to the Ontario government's proposals.

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17 Albert Breton, "Supplementary Statement," in Macdonald Commission, *Report*, vol. 3, p. 488.

Generally overlooked in these discussions is the fact that explicit national standards in areas of shared federal-provincial responsibility are almost entirely lacking. The health-care field is Canada's principle example of explicit national standards, and this situation has existed only for seven years, since the passage of the *Canada Health Act* (CHA) in 1984. The assumption that our social contract requires this framework to be extended to numerous other areas neglects some key questions. Is the capacity to vary approaches to social legislation not a key virtue of a federal state? What if the great majority in a given province want to do something different? What is equal about similar dollar payments if costs of living are different? Are standards of access to be set with regard to people in small, remote communities or to their counterparts in large urban areas? How are the people of a province better served if their provincial government is obliged to follow bad policies imposed at the national level? Is the goal equality of opportunity or equality of result?

Such questions demand answers because national standards require measuring sticks. Osberg and Phipps recognize the difficulty posed by specific definitions of the mechanisms to be used in meeting the requirements of a charter, but being aware of a problem is not the same as addressing it. How can we be sure that, as Osberg and Phipps claim, a social charter specification of "adequate" provision of food, clothing, shelter, education, and medical care would allow for significant experimentation?

The CHA offers an important counterexample: the standards set out in it are quite explicit about mechanisms. One might ask whether preventing provinces from imposing a minor charge for use of hospital emergency services when alternative treatment is available, thus freeing up resources for preventive care or life-saving surgery, is really the best way of contributing to the good health of the population.

In practice, a definition of "adequate" that had substance would have to spell out mechanisms in some detail — and if those definitions were not provided by legislatures, they would be provided by judges. Moreover, observers of current debates over such issues as

government support for housing, education, and day care may be forgiven for worrying that standards and mechanisms in a social charter would display the same biases in favor of government monopoly, coverage regardless of need, and unconditional commitment to minimal user cost that characterize the CHA. The shortcomings of this approach are already evident in many of Canada's housing and education policies and provide a base on which an imaginative reader can conjure up images of CHA analogues in other social policy areas.[18]

Legislating Prosperity (and Other Nice Things)

> *What is the good of discussing a man's abstract right to food or medicine? The question is upon the method of procuring and administering them. In that deliberation, I shall always advise to call in the aid of the farmer and the physician, rather than the professor of metaphysics.*
>
> — Edmund Burke[19]

Are Good Intentions Enough?

A further objection to the social charter proposal emerges from differences between unconstrained and constrained views of the importance of intentions. On the face of it, Canadian governments have been powerfully motivated for decades to better the lot of the general population, and the plight of the worst off has always been a major concern. The growth of Canada's public sector to its current dimensions is in large part a reflection of efforts to these ends. Over

18 Indeed, the Ontario paper, which explores the CHA as a model in considerable detail, mentions unconditional access and public administration as principles that could be enshrined in other policy areas as well. (Ontario, Ministry of Intergovernmental Affairs, pp. 17–18.)

19 Edmund Burke, *Reflections on the Revolution in France* (1790; reprint, Harmondsworth: Penguin, 1969), pp. 151–52.

the years, the plight of the worst off has been improved enormously in absolute terms. As social charter advocates note, however, many Canadians live in distressingly poor conditions. In addressing the question of why this is so, unconstrained and constrained thinkers are likely to arrive at different conclusions.

The unconstrained response stresses the inadequate commitment of governments to the cause. Thus, Osberg and Phipps refer to a "focus of macroeconomic policy...firmly fixed on the prevention of inflation rather than the reduction of unemployment";[20] Myles decries "almost two decades of social policy neglect in Canada"; Echenberg and Milner describe "efforts to savage the social infrastructure"; and the Ontario paper speaks of "a concern that Canadian governments have lost the momentum in social policy."[21]

In contrast, a constrained observer might conclude that since Canadian governments have been committed for at least 50 years to provide a growing variety of transfers, goods, and services to the population, the persistence of poverty is testimony to the difficulty of the task of eradicating it. More important than the absence of a clause in the Constitution are the limits on governments' ability to achieve everything citizens would like. Economies are indeed "complex creatures that do not respond to commands," as Echenberg and Milner say. No society has yet succeeded in eliminating indigence, and it is distinctly possible that none ever will, even with the best intentions in the world and the innovative approaches that the future is sure to bring. Certainly, the inefficiencies of the public sector and the costs imposed by high taxes make continued expansion of government a questionable means to that end.[22]

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20 The history of the 1970s suggests that this advocation of inflationary monetary policy as a cure for unemployment may be another example of good intentions frustrated by an uncooperative real world.

21 Ontario, Ministry of Intergovernmental Affairs, p. 13.

22 Also, progress in equalizing income distribution, an avowed aim of social charter advocates, would be furthered by cutting back or eliminating transfers to the better off. A flexible social charter might permit such deviations from universality, but it is doubtful whether a rigid one would.

Great Expectations and Great Disappointments

> *Law expands in proportion to the resources available for its enforcement. Bad law is more likely to be supplemented than repealed. Social legislation cannot repeal physical laws.*
>
> — Dallin Oaks[23]

It is in hopes for the future that the differences between the unconstrained vision of the social charter advocates and the constrained vision of its critics become most vivid. Some advocates present the social charter as a powerful potential cure for a wide variety of Canada's ills — linguistic and regional divisions among them.

On the economic front, Osberg and Phipps list slower income growth, persistent poverty, the rise of part-time work, and many groups' growing dependency on transfer payments as developments whose ill effects could be mitigated by charter-directed governments. Echenberg and Milner argue that "once people have a claim on the whole — in this case, the economy — it is more likely that they will accept responsibility for its nurturing and growth." This vision is an attractive one, but the experience of highly collectivized economies belies it. Closer to home, it is hard to see how the collective bargaining positions of civil servants — who clearly have a direct interest in the prosperity and revenue-generating capacity of society as a whole — have demonstrated concern for the collective good greater than that of private sector workers.

Claims for the charter go beyond economics, however. Echenberg and Milner assert that a charter would result in "more socially integrated and stable communities, ...would commit government ...to developing programs and initiatives that would provide the approaches and training needed to reach all those Canadians ready and willing to work," would help to prevent the creation of underclasses, and would combat xenophobia and racism. The Ontario

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23 Dallin H. Oaks, "Unruly Laws for Lawmakers," *Louisiana Bar Journal* 26 (June 1978).

paper speaks of the value of a charter in "reducing child and family poverty, reducing domestic violence and abuse, securing economic and social dignity, and promoting the full participation of all in Canadian life."[24]

These statements suggest a naive conception of governments' ability to command things to "be better." They also reflect hopes so high as to raise concerns about the future of Canadian politics after a social charter was in place. One can only echo Richards' appeal for more restrained expectations about the benefits of constitutional reform — and wonder what the reaction of charter proponents would be if (when) the magic wand failed to transform our imperfect world in accordance with their visions. Past experience suggests that, rather than acknowledging the intractable nature of reality, many advocates would fulminate against those who are presumed to be malevolently preventing the charter from doing its good work. Rather than admitting the defects of their vision, advocates could be expected to urge disadvantaged groups to make ever more vigorous use of the charter's machinery and to urge judges to take ever more activist stances, making rules where legislators fear to tread.

Are All Canadians Now and Forever Social Charter Advocates at Heart?

> *Taxation of effort is a discouragement to industry and parsimony, so no government of Canada shall impose levies on the wages of labor or the interest paid on capital. The Christian sabbath shall be observed throughout the land. Only male property-owners will vote. A man's home being his castle, burglary will be punished by hanging. Citizens guilty of vagrancy or sloth will be sent to workhouses, which will be maintained by governments for that purpose. Combinations in restraint of trade are an affront to free commerce; accordingly, trades unions will not be permitted.*
>
> — William Watson's fictitious 1867 social charter[25]

24 Ontario, Ministry of Intergovernmental Affairs, p. 3.

25 William Watson, "Social Policy Railway Can't Bind Us Together," *Financial Post*, September 27, 1991.

Individual Canadians will find the objections raised thus far in this essay more or less convincing depending on their own visions of their fellow citizens, of Canadian society, of the appropriate relationship between citizens and the state, and of the capacity of governments to give effect to their good intentions. If a substantial number of Canadians do disagree with the social charter proposal along these (or other) lines, their objections invalidate a further claim of social charter advocates: that a charter could serve "to preserve some form of pan-Canadian identity in the face of creeping national dissolution" (Myles) or as a rallying point for consensus on constitutional change.

Lack of Consensus on Basic Issues

The existence of consensus — or, alternatively, the need for it — is a strong theme in the Osberg/Phipps and Echenberg/Milner essays, as well as in the Ontario paper. Osberg and Phipps go further, arguing pragmatically that a social charter might be helpful in breaking the log jam on other issues. This argument is consistent with the unconstrained view, which lays such stress on intentions. There can, after all, be few of us who would not like to see everyone in the country fed, clothed, housed, educated, and cared for above minimum standards of decency. But is it really true that there is a consensus among Canadians on how these things can best be achieved or on how unconditional the commitment of government to provide them should be?

A prominent strain in nationalist economic thinking has it that the welfare state is an essential element of the Canadian identity. Like many nationalist myths, this one lacks historical and geographic perspective and is more wishful thinking than fact. The United States — the focus of most such comparisons — was historically ahead of Canada in many social fields and has currently gone further with the sort of court-driven extension of rights that charter boosters advocate. Most European countries have public sectors larger than that of Canada[26] and, it should be noted, inferior records of income growth and job creation over the past two decades.

26 As measured by revenue and expenditure relative to GDP.

More critically, Canadians simply do not view every aspect of existing social policy in the same favorable light as medicare. Opinion is divided on Canada's unemployment insurance system with its pronounced and unusual focus on passive income support. In Ontario, the recent explosion of welfare payments and recipients — and suspicion that the system is being abused to a greater extent than the 3 to 4 percent figure cited by government sources — has engendered a loud debate. Dissatisfaction with the inadequate performance of state-run primary and secondary education systems is growing. Even the current structure of medicare, with its monopolies and lack of any demand-control mechanisms save queuing, may attract less wholehearted support in 20 years' time.[27] Asserting that the vast majority of Canadians unswervingly support the vast majority of Canada's social programs does not make it so.

I would venture a contrasting assertion: many Canadians see self-reliance and industry as distinctively Canadian characteristics, dislike government handouts, and possess a strong sense of personal responsibility to family and community.[28] Many Canadians find state-enforced redistribution far less morally uplifting than individual generosity. The statement "federal welfare programs... represent one of the few ways in which the federal government can fashion appeals that cut across linguistic and regional divisions"[29] has a mercenary sound that many would find unattractive.

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27 It may not be necessary to wait 20 years. A majority of respondents to a recent *Globe and Mail*/CBC poll said that the most appropriate way to deal with rising health care costs would be not to raise taxes or cut services, two options that the CHA allows, but to charge user fees, an option precluded by the CHA. See *Globe and Mail* (Toronto), November 5, 1991.

28 It may be true, as Osberg and Phipps say, that "the present federal government... is not trusted by a significant fraction of the population to protect distinctively Canadian social values." However, the fact that much of the federal Progressive Conservatives' loss of support has been to the benefit of the Reform Party and the Bloc québécois — neither prominent supporters of the social charter idea — suggests that a significant fraction of that significant fraction has in mind a set of social values different from those of the social charter advocates.

29 Keith Banting, quoted by Myles.

Canada existed before the welfare state. Indeed, it weathered highly divisive crises, including the Louis Riel controversy and battles over conscription at the time of both world wars, before the welfare state appeared. The fact that the current crisis seems at least as serious a threat to the country as its predecessors suggests that the welfare state has not strengthened the bonds of Canadian nationhood.

The Possibility That Consensus May Change

In the light of these criticisms, proposals for a social charter take on a reactionary hue as attempts to protect, or even enhance, a version of the welfare state with which parts of the population have little sympathy. Moreover, as William Watson illustrates, even if an overwhelming majority of Canadians did support every feature of the welfare state in its current form, it would still be unwise to set it in stone.

Changing circumstances and new ideas are sure to generate novel and worthwhile approaches to the delivery of social benefits. Canadians must be free to refine both the aims and the means of social programs. As has been pointed out by many commentators on this issue, constitutions are not expressions of policy choices; they are documents that specify how policy choices are to be made.

Francophone Quebecers' Views of a Social Charter

This view of a charter as expressing, or helping to achieve, a consensus among Canadians may be wrong in one acutely important way: that regarding differences between Quebec and the rest of Canada. As of the time of writing, the proposal for a social charter appears to have attracted little interest in Quebec, and what comment there has been has not been unanimously positive.[30]

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30 See, for example, "Le programme du NPD dans la constitution?" editorial, *La Presse* (Montreal), October 11, 1991.

Certainly, the existence of differing views of the Charter of Rights and Freedoms in Quebec and in the rest of Canada gives little comfort to those who suppose that a social charter can serve as a kind of nation-building glue between francophone Quebecers and other Canadians. The push for a social charter seems to come only from a segment of anglophone Canadian society. To suppose that this proposal can serve as the nucleus of an agreement in a still-united federation is to lean on a weak reed. To speculate, as Echenberg and Milner do, that a social charter — especially a judiciable one — could serve as an article of association between a sovereign Quebec and the rest of Canada is to grasp at straws.[31]

Conclusion

> *The real threat to our accomplishments on the social policy front, and the surest way to place these achievements in the balance, is to attempt to address the social and economic needs of the 1990s with a social policy framework that was designed specifically to address the needs and challenges of the 1960s.*
>
> — Thomas Courchene[32]

The economic and political pressures that concern social charter advocates are certain to be felt, at times acutely, throughout the next decade and even more strongly as we move into the second and third decades of the next century, when demographic developments will begin to exert powerful and often unwelcome pressures on Canada's social programs. But a social charter empowering the courts to defend CHA-style social programs against innovation seems a poor response.

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31 At the moment, questions about the interactions between aboriginal legal and political systems and those of federal, provincial, and territorial governments under a regime of substantial aboriginal self-government are so unsettled as to make discussion of the impact of a social charter in this area difficult. It seems safe to say, however, that the problems here would be at least as awkward as those involving Quebec.

32 Thomas J. Courchene, *Social Policy in the 1990s: Agenda for Reform*, Policy Study 3 (Toronto: C.D. Howe Institute, 1987), p. 184.

It may be that a majority
date, that health-care resourcrity of Canadians will decide, at some future
policed use of emergency waurces should be transferred away from un-
unemployment insurance ber wards and toward preventive care, or that
of active job search, or that thebenefits should require training or evidence
tion of government-financed the implicitly regressive income redistribu-
or that rent subsidies or vouced postsecondary education needs reform,
housing projects and rent ccouchers, rather than government-financed
problem of homelessness. Giv controls, are the best approaches to the
should be careful about handiGiven such possibilities, current Canadians
minorities with vested interesnding a powerful legal weapon to privileged

Over the past 40 years, rests in current systems.
ness to devote ever-greater rs, Canadians have shown great willing-
ills. The challenge over the ner resources to the amelioration of social
more wisely. To see flexibility next 40 years will be to use those resources
as inconsistent with the prom lity, diversity, and political accountability
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Constitution is to take a dim g a rigid, judiciable social charter to the
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Social programs inevitasocial affairs.
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between ends and apparently inancing, and often subtle inconsistencies
compounded when the econo tly reasonable means. These problems are
ing rapidly. Under such circu onomic and social environment is chang-
ble — the best that can be rcumstances, literal consensus is impossi-
adaptable accommodation. Th be hoped for is finding workable and
appropriate venue for sorting . The political and legislative arena is the
the judicial interpretation of ding these problems out. It is there, not in
stitution, that the best hope of open-ended commitments in the Con-
questions of social policy lies. ope for reconciliation over the difficult
ies.

Democracy, Affordability, and the Social Charter: *A Reply*

Lars Osberg

It is always interesting to read what people think you said. The comments by John Richards and William B.P. Robson are especially interesting because they contrast so sharply with what Shelly Phipps and I actually do say in our contribution to this volume. Their comments are, however, extremely useful, in part because they so clearly identify three major misconceptions about a social charter.

- A social charter is *not* about "big government." It *is* about socially acceptable outcomes. Adopting a social charter does not imply choosing a specific means to attain socially acceptable outcomes — it just requires that they be attained. As Phipps and I note, a government might believe that the abolition of rent controls and the elimination of zoning restrictions would produce such an increase in the housing supply that the private market would provide all needed housing. If these policies worked, they would be *entirely* in compliance with a social charter that included the right to adequate housing. If they did not work, they would have to be changed — presumably, policies that do not work *should* be changed. Much of the space in Robson's and Richards' comments is devoted to attacking "big government." Both argue that the market mechanism is a more effective means for meeting housing needs than is big government. Neither appears to recognize that such an argu-

ment implies that "small government" would be able to comply with a social charter.

- Contrary to assertions by Richards and Robson, a social charter would *not* force homogeneity of social policy across Canada. Phipps and I are careful to point out that a social charter would impose a common set of criteria on social outcomes — for example, adequate food, clothing, shelter, health care, and education — corresponding to a common core definition of the rights of Canadian citizenship. But specific jurisdictions would be entirely free to meet (or exceed) those criteria in the way most appropriate in their particular context. For example, it is highly unlikely — for social, cultural, and economic reasons — that the same housing policies would be appropriate in isolated aboriginal communities as in downtown Toronto. What a social charter *would* require is that in both communities some set of policies be in place such that people are not forced to sleep in the streets.

- Entrenching a social charter in the Constitution does *not* mean, as Richards and Robson suggest, the end of politics and the beginning of rule by judges. I thought that Phipps and I were fairly clear in saying that there is a range of enforcement mechanisms for a social charter and that we hoped to start a debate on the nuts and bolts of how a social charter should best be enforced. Both Richards and Robson, however, focus on a *specific* enforcement mechanism — namely, full justiciability. Although Havi Echenberg and Arthur Milner, in their contribution to this volume, support the idea that the existing court system should be used to enforce the provisions of a social charter, this mechanism is *not* endorsed elsewhere — either by the Ontario discussion paper that both Richards and Robson cite in other contexts or, indeed, by us.

In my view, the existing court system may not be the best place in which to assess social charter rights because existing courts come with a particular adversarial structure and with particular rules of evidence and judicial standing, and without an independent re-

search capacity. If the existing courts are to be used, I would argue that they should be limited to findings of fact — that is, the determination of whether or not social charter rights have been infringed — and the assessment of jurisdiction. The design of remedies is appropriately left to the political system.

Space does not permit a complete listing of all the points of disagreement that Phipps and I have with Richards and Robson. In some cases, there are clear errors of fact. For example, contrary to Robson's assertion, it is not true that there has been "increasingly generous income support for the jobless" — all the post-1971 reforms to the *Unemployment Insurance Act*, most recently in 1989, have decreased the generosity of the UI system. Other issues are more general. For example, Robson draws an untenable distinction between "negative" and "positive" rights on the basis that the former constrain state action, while the latter require resources, which must be raised by taxation. However, many of our existing civil rights entail financial obligations for government — for example, the right to a fair trial may require the state to pay for legal counsel and court interpreters. The U.S. constitution prohibits "cruel and unusual punishment," but this negative phrasing of individual rights could be positively phrased as a right to humane punishment, if convicted. Whether phrased positively or negatively, expenditure is required, since more prisons must be built when existing prisons become overcrowded.

In addition, there are misinterpretations by Richards and Robson. For example, I thought Phipps and I were fairly clear in saying that the *historical* origin of interprovincial transfer payments was, in part, compensation for the protected markets that Central Canada enjoyed in the Maritimes and in Western Canada, but this historical justification is increasingly irrelevant in a free trade environment. Evidently, Richards interpreted us differently.

One could go on, but there are three main themes to the comments of Richards and Robson that should be stressed: their confusion of ends and means, their concerns about affordability, and their stated worries about the democratic process.

Both Richards and Robson confuse ends (such as adequate health care) and means (such as emphasis on preventive medicine or emergency wards). This confusion is exemplified in Robson's conclusion, where he states that Canadians may in future want to change the way in which health care — or unemployment insurance or postsecondary education or housing — is delivered. The important point, however, is that, after a social charter has been put in place, governments would be as free to experiment with new modes of program delivery as they are now. The difference is that a social charter would provide an additional mechanism for asking "Is it working? Do these changes, *in fact*, imply that Canadians' access to health care — or education or housing — is being maintained?" A social charter would specify a criterion for deciding whether a policy is "working" — namely, that, whatever other objectives are also satisfied, the end result must be that all Canadians have access to adequate food, clothing, shelter, health care, and education. A social charter would also require that something be done if policies are not working. By itself, however, a charter neither forbids social policy experimentation nor dictates the form of remedies for failed experiments.

Richards and Robson devote considerable attention to the issue of affordability. As already noted, a social charter does not dictate the means by which such social objectives as a minimum adequate standard of living should be produced. Some would argue that stimulative macroeconomic policies have the biggest impact on the rate of poverty, while others would emphasize improved training to enable the poor to gain access to employment. Ensuring that jobs are available, and that poor people have the skills to fill them, is undoubtedly a more effective policy to reduce poverty than simply transferring income.

It is still useful, however, to keep in mind orders of magnitude. Straightforward cash transfers to erase the poverty gap may be the most expensive available policy, but such transfers — that is, the total additional cash required to eliminate poverty — would only amount to about 1.04 percent of gross domestic product (GDP). Canada is a rich country; it could afford to spend 1.04 percent of its GDP on such

rich country; it could afford to spend 1.04 percent of its GDP on such a goal. Alternative policies that could have the same effect are also possible, at a lower cost. Although Phipps and I compare the poverty gap of 1.04 percent of GDP with the 1.07 percent of GDP that Canadians now spend on alcohol, it would probably be more appropriate to compare the size of the poverty gap with the 2 percent increase in GDP that, according to Okun's law, Canada would obtain if unemployment were to decline by one percentage point.

Both Richards and Robson argue that a presumed increase in taxes[1] would undermine what Richards calls "the willingness of people to produce wealth." It is true that higher taxes imply a decline in the net return to an additional hour of labor supply and that social programs contain disincentives to work. That is why Phipps and I, along with other economists, have extensively analyzed the determinants of the wage elasticity of labor supply and the responsiveness of labor market behavior to social programs such as unemployment insurance.[2] We have examined a number of specific segments within the Canadian population and looked carefully at interactions between the tax system and other social programs, while controlling

1 Richards offers an argument, which I frankly cannot understand, that a social charter would mean that governments would not want to save money. With or without a social charter, however, the incentives to economize would remain the same. A dollar saved on one program would always be a dollar that does not have to be raised from taxation or that can be spent on an alternative use.

2 Examples of our work include: L. Osberg, "Behavioural Response in the Context of Socio-Economic Micro-Analytic Simulation," Statistics Canada, Analytical Studies Research Paper 1 (Ottawa, April 1986); idem, "Is It Retirement or Unemployment? The Constrained Labour Supply of Older Canadians," *Demographic Review* (Canada, Department of National Health and Welfare) (1988); S. Phipps, "Quantity Constrained Household Responses to Unemployment Insurance Reform," *The Economic Journal* 100 (1990): 124–140; idem, "The Impact of the Unemployment Insurance Reform of 1990 on Single Earners," *Canadian Public Policy* 16 (1990): 252–261; idem, "Behavioural Response to UI Reform in Constrained and Unconstrained Models of Labour Supply," *Canadian Journal of Economics* 24 (1991): 34–54; L. Osberg and S. Phipps, "Quantity Constraints in the Analysis of Labour Supply," Dalhousie University Working Paper 89-04 (Halifax, N.S., 1989, Mimeographed); idem, "On Integrating Income Tax and Unemployment Insurance in Models of Labour Supply" (Dalhousie University, Halifax, N.S., March 1992, Mimeographed); and idem "Large Sample Estimates of Labour Supply: Results with Quantity Constraints," *Oxford Economic Papers* (forthcoming).

for variations in labor market demand. Yet, our results are, in the end, substantially in agreement with everyone else who has seriously examined labor supply elasticities.[3] Our econometric work indicates that if increased transfers were financed by higher taxes, one could expect a 1 percent decline in the after-tax wage to induce a decline of, at most, 0.03 percent in annual hours of labor supply. And I would emphasize that alternative policies — such as lower interest rates to stimulate the economy — produce greater output, lower poverty, *and* smaller government deficits.

As to the worries expressed by both Richards and Robson about the implications of a social charter for the democratic process, the entrenchment of a social charter would be neither more nor less undemocratic, and neither more nor less carved in stone, than the entrenchment of any other constitutional provision — for example, the constitutional prohibition of interference with the free mobility of capital, labor, services, and goods. Constitutionalization, either of a social charter or of an economic union, implies that other laws must be in accordance with constitutionalized principles and that the amendment of these principles requires the concurrence of the federal Parliament and seven provincial legislatures — representing 50 percent of the population — rather than a simple majority in a federal or provincial legislature. In other words, the decision to entrench either a social charter or a guarantee of economic union in a renewed Constitution represents a setting of priorities — a decision that some issues *should* take precedence and that some policy goals *should* be more difficult to change. Constitutions are like that. One of the roles of a written constitution is to identify those issues that are more central than others; the problem for Canadians is to identify those issues that are most central to their social values.

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3 See D. Hum and W. Simpson, *Income Maintenance, Work Effort and the Canadian Mincom Experiment* (Ottawa: Economic Council of Canada, 1991), for a survey of Canadian empirical evidence. For a survey and assessment of the importance of alternative econometric techniques, see A. Mroz, "The Sensitivity of an Empirical Model of Married Women's Hours of Work to Economic and Statistical Assumptions," *Econometrica* 55 (July 1987: 765–799. For an encyclopedic survey, see M. Killingsworth, *Labor Supply* (Cambridge: Cambridge University Press, 1983).

Richards and Robson question whether there is, in fact, a broad consensus on a common core definition of Canadian citizenship that a social charter might help to express, but they provide no evidence. Fortunately, there are some data to suggest that such a consensus does indeed exist. A CTV/*Toronto Star* poll, conducted in October 1991, asked a representative sample of Canadians: "Do you approve or disapprove of a social charter guaranteeing the right to health care, social assistance, and education?" Eighty-five percent of the respondents said that they did (the figure rose to 88 percent in Quebec).[4]

Finally, a word on the possibility of "radical improvement." Robson argues that some people have unconstrained visions and others have constrained visions, but such phrases are not a useful guide to policy decisionmaking. The world is not likely ever to be perfect and a social charter will not make it so. Given that events present us with many unavoidable choices, however, all that an individual or a society can do is to attempt to make the best possible choice among the available alternatives. Entrenching a social charter in the Constitution is an alternative for Canada. Although this would not instantly solve all of Canada's social problems — and may not even produce as many desirable outcomes as Echenberg and Milner suggest in this volume — it would enable better social policy to be made over time than would occur in its absence. Furthermore, without some such clear, credible commitment to the maintenance of distinctly Canadian social values, there is every likelihood that the current process of constitutional renewal will fail, with extremely serious consequences for all Canadians.

4 *Toronto Star*, October 15, 1991. Nationally, only 9 percent (6 percent in Quebec) said that they disapproved, while 6 percent had no response.

The Contributors

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Lars Osberg is Professor of Economics at Dalhousie University in Halifax. He has written extensively on economic inequality, structural change in modern labor markets, labor market segmentation, social policy design, labor supply behavior, and unemployment. Although born and raised in Ontario (across the river from Quebec), his perspective on Canada has been greatly shaped by his parents' Alberta roots and their heritage of the prairie community.

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John Richards grew up in Saskatchewan and served as a member of that province's legislature during the first term of the Blakeney government from 1971 to 1975. For the first two years of his term, he was legislative secretary to the Minister of Health. In mid-term, he crossed the floor and sat as an "independent socialist." In his words, he has "since mellowed and rejoined the NDP." Trained as an economist, he currently teaches in the business faculty at Simon Fraser University, Burnaby, B.C. He has written on resource policy, labor relations, and public policy.

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Lars Osberg and *Shelley Phipps* argue strongly that a social charter has become an essential part of constitutional reform in Canada. In particular, if a strong economic charter emerges from the reform, it would reduce the role of the democratic process in restraining the impact of market forces. This, they say, would then imply the need for a strong social charter to protect Canadians who are adversely affected by those market forces. Because of the speed of social and institutional change, a social charter must provide a legal framework that entrenches enduring social values, including the principle that all Canadians have the right to food, clothing, shelter, health care, and education.

Contributions by *Havi Echenberg* and *Arthur Milner* and by *John Myles* expand on some of the themes introduced by Osberg and Phipps, and reinforce the case for a social charter.

Arguments against a legally entrenched social charter are presented in two essays by *John Richards* and *William B.P. Robson*. Richards suggests that Canadians may be at or near the limit of their willingness to pay taxes, and a social charter can only succeed in forcing governments to spend more on social policy by generating larger deficits. Robson is even more adamantly opposed, arguing that a social charter is fundamentally undemocratic and that it would, in his words, "provide the welfare state of the past with constitutional armor."

Lars Osberg closes the volume with a reply to Richards and Robson.

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